82-6768

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IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1982

DEBORAH RENE FINNEY,

Appellant,

v

MICHIGAN DEPARTMENT OF SOCIAL SERVICES,

Appellee.

* * * * * *

(In re Taurus F., a Minor.)

JURISDICTIONAL STATEMENT

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NOW COMES Deborah Rene Finney and appeals as of right a decision upholding the termination of her parental rights. She also petitions for a writ of certiorari to review constitutionally based procedural errors in the case. See Prudential Insurance Company v Cheek, 259 US 530, 547; 42 S Ct 516 (1922).

QUESTIONS PRESENTED:

I.

Whether the Michigan statute under which appellant's parental rights were terminated, MCL 712A.19a(d), MSA 27.3178(598.19a)(d) violates appellant's rights to due process of the law, equal protection under the laws, and freedom from cruel and unusual punishment as secured by the Fifth, Fourteenth, and Eighth Amendments to the United States Constitution.

II.

Whether MCL 712.A.2(b), MSA 27.3178(598.2)(b), as construed to provide that children whose parents voluntarily wish to place them in the custody of relatives are "without proper custody" and subject to the jurisdiction of the court, violates appellant's rights under the First, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution.

III.

Whether a State, in a parental rights termination case, may, consistent with Santosky v Kramer, _____ US _____, 102 S Ct 1388 (1982), shift the burden of producing evidence as to the adequacy of the family placement for the child from the State to the parent.

IV.

Whether the procedures through which appellant's child was removed from her -- which included, inter alia, an initial ex parte hearing, a later hearing during which the State was permitted to proceed when appellant was without counsel, and the State's failure to disclose to the Court evidence favorable to appellant -- violated appellant's right to due process of the law as secured by the Fifth and Fourteenth Amendments to the United States Constitution.

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STATEMENT AS TO PARTIES

This is a parental rights termination case initiated by the Michigan Department of Social Services against Deborah Rene Finney as the mother of Taurus F., James Finney as the husband of Deborah Rene Finney and putative father of Taurus F., and Martin Cowens as the natural father of Taurus F. Taurus F. has been represented throughout by appointed counsel.

The Petitioner sought, and the Probate Court ordered, the termination of the parental rights of all three respondents in 1978. Only Appellant Deborah Rene Finney has appealed. James Finney has never appeared in this case. Martin Cowens has not appeared since trial.

For purposes of this appeal, Appellant Finney has served counsel for the Michigan Department of Social Services and counsel for Taurus F. with all relevant pleadings.

OPINIONS BELOW

The opinion of the Michigan Supreme Court is reported at 415 Mich 512, 3A-39A. The opinion and order of the Washtenaw County Probate Court terminating Ms. Finney's parental rights is dated August 24, 1978, and is unreported. 41-44A. The opinion and order of the Washtenaw County Circuit Court affirming the decision of the Probate Court is dated October 26, 1979, and is unreported. 45-49A. The order of the Michigan Court of Appeals denying leave to appeal, dated April 23, 1980, is unreported. 50A. The order of the Michigan Supreme Court, dated October 3, 1980, remanding the case to the Washtenaw County Probate Court is reported at 409 Mich 920, 51A. The Findings of Fact and Recommendation of the Probate Court, dated February 2, 1981, are unreported. 52-55A. The order of the Supreme Court, dated July 6, 1982, again remanding the case to the Washtenaw County Probate Court is unreported. 56A. The Probate Court's Findings and Explication, dated September 3, 1982, are unreported. 57-67A. The Probate Court's Amendment of its findings, dated September 9, 1982, is also unreported, 68A.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. MCL 712A.19a(d), MSA 27.3178(598.19a)(d)

> Where a child remains in foster care in the temporary custody of the court following the initial hearing provided by section 19, the court may make a final determination and order placing the child in the permanent custody of the court, if it finds any of the following:
>
> * * * *
>
> (d) A parent or guardian of the child is convicted of a felony of a nature as to prove the unfitness of the parent or guardian to have future custody of the child or if the parent or guardian is imprisoned for such a period that the child will be deprived of a normal home for a period of more than 2 years.

2. MCL 712A.2(b), MSA 27.3178(598.2)(b):

> Except as provided herein, the juvenile division of the probate court shall have:
>
> * * * *
>
> Jurisdiction in proceedings concerning any child under 17 years of age found within the county ... who is deprived of emotional well-being, or who is abandoned by his parents, guardian or other custodian, or who is otherwise without proper custody or guardianship.

3. United States Constitution, Amendment I.

> Congress shall make no law ... abridging ... the right of the people peaceably to assemble;

4. United States Constitution, Amendment V.

> No person shall ... be deprived of life, liberty, or property, without due process of law;

5. United States Constitution, Amendment VIII.

> ... nor [shall] cruel and unusual punishments [be] inflicted.

6. United States Constitution, Amendment IX.

> The enumeration of the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

7. United States Constitution, Amendment XIV.

> ... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

JURISDICTION

The opinion of the Supreme Court of Michigan was dated December 23, 1982. A timely motion for rehearing was filed and denied by Order dated February 22, 1983. The Appeal and Jurisdictional Statement were filed within 90 days of that date. The Michigan Supreme Court's affirmance upholds the constitutionality of State statutes, MCL 712A.19a(d), MSA

27.3178(598.19a)(d), and MCL 712A.2(b), MSA 27.3178(598.2)(b) in the face of appellant's challenge to the constitutionality of those statutes. Appellant invokes the jurisdiction of this Court pursuant to 28 USC §1257(2) and (3).

STATEMENT OF THE CASE*

Appellant, Deborah Rene Finney, was convicted of possession and delivery of a controlled substance in November of 1977 and was sentenced to a term of imprisonment of 10 to 20 years. Ms. Finney was pregnant when she was sentenced to prison. On March 17, 1978, she gave birth to a daughter, Taurus Michelle Finney.

Ms. Finney is the mother of three children. Her two older children were placed with relatives prior to her incarceration. There is no claim that either of these children is or has been abused, neglected, or without proper custody. Prior to Taurus' birth, there was some uncertainty as to whether a family member would take custody of the child. However, near the time when Taurus Michelle was born, Michelle Thomas, the child's aunt, contacted the Department to make arrangements to pick up the child. The Department informed her that she could not have custody of the child. 108A.

After these contacts, the Department filed an abuse and neglect petition with the Washtenaw County Probate Court alleging that the known relatives of Taurus F. were unable or unwilling to care for the child and requesting emergency placement in foster care. 69-70A. At an ex parte hearing on March 23, 1978, the court ordered Taurus placed in foster care. 71A.

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* A concise statement of facts relevant to the appeal was stipulated to by the parties and approved by the Circuit Court. 77-79A. See 415 Mich at 519-522, 7-9A.

On March 29, 1978, a formal neglect petition was filed. 72A. A preliminary hearing, pursuant to Michigan Juvenile Court Rule 4, was held on April 3, 1978. Ms. Finney appeared at that hearing and requested in writing an adjournment for appointment of counsel. Despite Ms. Finney's request, the referee permitted the Department to submit testimony, and, based on that testimony, authorized the filing of the petition and the placement of the child. 104-06A. Neither the petitions, 69-70A; 72A, nor the testimony, 105-06A, discloses to the Court Ms. Thomas' contacts with the Department.

The Department amended its petition on July 20, 1978, to allege that Ms. Finney's proposed placement with Ms. Thomas was unsuitable because Ms. Thomas' home was unfit. 75-76A.*

A trial was held on July 31, 1978. At trial, Ms. Thomas testified that she was willing to take custody of Taurus that very day. 109A. There was no evidence submitted that Ms. Thomas would not accept custody of Taurus.

On July 31, 1978, the Probate Court issued an opinion and order permanently terminating Ms. Finney's parental rights. 41-44A. The court's opinion makes no reference to Ms. Thomas or her plan to care for the child, and recites the language of MCL 712A.19a(d), MSA 27.3178(598.19a)(d) as its basis for termination of parental rights.

Ms. Finney appealed to the Circuit Court for Washtenaw County which affirmed the decision of the Probate Court by opinion dated October 26, 1979. 45-49A. Ms. Finney sought leave to appeal in the Michigan Court of Appeals, but her request for leave to appeal was denied on April 23, 1980. 50A.

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* Ms. Thomas' home was allegedly unfit because Ms. Thomas "is in the process of obtaining a divorce, has custody of three young children, works full time, and lacks a permanent and reliable babysitter." 75A. There has never been an allegation that any child under Ms. Thomas' care has been abused or neglected.

Ms. Finney sought leave to appeal to the Michigan Supreme Court. On October 3, 1980, the Supreme Court remanded the case to the Washtenaw County Probate Court for an evidentiary hearing. 51A. The evidentiary hearing included part or all of nine days of testimony and argument and over 1,000 pages of documentary exhibits. The Probate Court issued its Findings of Fact on February 2, 1981. 52-55A. The Supreme Court granted leave to appeal on March 27, 1981.

On July 7, 1982, the Michigan Supreme Court again remanded this case to the Probate Court with directions to make specific findings "concerning the propriety of a possible temporary and/or permanent placement of the child in question with her aunt." 56A. The Probate Court filed its Findings of Fact on September 3, 1982, and amended those findings on September 9, 1982. 57-68A.

On remand, the Probate Court found that "Michelle Thomas ... was willing to care for Taurus,", 60A, and that she was not "an unfit person to have care and custody of children", 64A. However, the Court found that Ms. Thomas placed conditions on her acceptance of Taurus and, from a silent record, implied a disagreement between the sisters as to the terms of custody. 60A. Based on this inferred disagreement, the Court found Ms. Thomas unavailable and Taurus without proper custody.*

The Michigan Supreme Court issued its opinion on December 23, 1982, affirming the lower court opinion by an equally divided vote. 3-39A.

The three justices who voted to reverse the lower court

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* The Court's inferred disagreement theory is contradicted by its later statements that it "declined to place the child with her aunt" because of concerns about the quality of the placement at the aunt's home. These concerns did not rise to the level of an unfit environment as that term is statutorily defined. 64-65A.

decision held that a parent could place a child with a relative without any interference from the state as long as that child is adequately cared for. 415 Mich at 537. The reversing justices went on to hold that neither the conditions on placement articulated by Ms. Thomas nor the allegations of the unsuitability of Ms. Thomas' home were sufficient to establish probate court jurisdiction under MCL 712A.2(b), MSA 27.3178(598.2)(b).

Although the dissenters were troubled that it was "impossible to tell under what authority the probate court took temporary custody of Taurus", 415 Mich at 531, n. 11; 16A, they did not directly address appellant's claims of procedural violations. The dissenting justices refused to transfer the burden of proof to parents in parental rights termination cases, 415 Mich 544-45; 27-28A. Thus, the justices for reversal had no need to consider the constitutional arguments presented in this petition. See 415 Mich 518; 7A.

The justices for affirmance held that proposed placement of a child with a relative by a parent who is herself unavailable constitutes a prima facie case of child neglect, 415 Mich 556, 37A; and that such a showing shifts the burden to the parents to show "that other arrangements to provide proper custody have been made", 415 Mich 556, 37A. The affirming opinion does not address appellant's constitutional challenge to MCL 712A.19a(d), MSA 27.3178(598.19a)(d); the opinion also fails to address appellant's challenge to the constitutionality of the procedure through which the probate court assumed jurisdiction over her child.

Ms. Finney was resentenced to two years probation and released from prison on February 5, 1982. Since that time, she has established and maintains a home for her two older children.

RAISING THE FEDERAL QUESTION

1. The constitutionality of MCL 712A.19a(d). The repugnancy of MCL 712A.19a(d) to the Fifth and Fourteenth Amendments to the United States Constitution was raised on the appeal to the Washtenaw County Circuit Court filed in September, 1978. 80-82A.

The Circuit Court addressed these constitutional issues and held that clause two of MCL 712A.19a(d) was constitutional. 47-48A.

Appellant again raised these issues to the Court of Appeals, which denied leave to appeal, and to the Michigan Supreme Court.

The dissenting justices for reversal implicitly acknowledged that the constitutional questions were properly before the court, but avoided reaching those questions by deciding the case on statutory grounds. See 415 Mich at 518; 7A. The opinion in favor of affirmance did not address appellant's constitutional claims.

The affirming justices' failure to pass on the federal constitutional objection to the validity of the State statute is an implicit rejection of appellant's constitutional argument and is equivalent to a finding of validity of the statute. Lawrence v State Tax Commission, 286 US 276, 282-83; 52 S Ct 556 (1932).

2. The Court's interpretation of MCL 712A.2(b), MSA 27.3178(598.2)(b). The construction of this statute challenged on this appeal originated in the Michigan Supreme Court.

Before that Court, Appellant Finney argued that her right to direct the upbringing of her child is a fundamental constitutional right and that the State could not constitutionally interfere with her planned family placement, absent clear and convincing evidence of abuse or neglect of her child in that placement.

3. Procedural violations in the assumption of jurisdiction. Appellant seeks review of this question through certiorari jurisdiction, 28 USC 1257(3). These arguments were raised on appeal to the Michigan Supreme Court, but not addressed in the opinion of the affirming justices. See 95-103A.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

INTRODUCTION

This Court has historically recognized the fundamental nature of a family's freedom of choice in child rearing decisions. Santosky v Kramer, ___ US ___, 102 S Ct 1388 at 1394 (1982). However, defining the exact scope of the constitutional protection of those fundamental rights has been problematical. Compare Santosky, supra, with Lassiter v Department of Social Services, 452 US 18, 101 S Ct 2153 (1981). The case at bar raises fundamental, unresolved substantive and procedural questions concerning the State's right to permanently sever the parent-child relationship when the parent wishes to place her child with a relative.

In Michigan, a Probate Court's ability to assume custody of a child is limited. Unless a child is delinquent, as defined in MCL 712A.2(a), MSA 27.3178(598.2)(a), or abused or neglected, as defined in MCL 712A.2(b), MSA 27.3178 (598.2)(b), the Probate Court lacks jurisdiction over the child. People v Brown, 49 Mich App 358, 212 NW2d 55 (1973); In Re Kurzawa, 95 Mich App 346, 290 NW2d 431 (1980).

If a child is found to be within the jurisdiction of the court under MCL 712A.2(b), MSA 26.3178(598.2)(b), the Probate Court has several dispositional or placement options open to it, MCL 712A.18, MSA 27.3178(598.18), including the termination of

parental rights. MCL 712A.19a, MSA 27.3178(598.19a).

On appeal below, and before this Court, Appellant Finney challenges both the constitutional sufficiency of the State's procedures in assuming jurisdiction over her child, and the constitutionality of the statutory provision relied on by the State in terminating her parental rights.

1. THE CONSTITUTIONALITY OF MCL 712A.19a(d), MSA 27.3178(5982.19a)(d).

Appellant Finney's parental rights were terminated pursuant to MCL 712A.19a(d), MSA 26.3178(598.19a)(d). The provision provides for termination upon a finding that

> A parent or guardian is convicted of a felony of a nature as to prove the unfitness of a parent or guardian to have future custody of the child or if the parent or guardian is imprisoned for such a period that the child will be deprived of a normal home for a period of more than two years.

The statute recalls an unfortunate era when persons convicted of crimes were stripped of their civil and constitutional rights when they entered the prison gates. See Tentative Draft, Standards Relating to the Legal Status of Prisoners, 14 Amer Crim L Rev 387, at 609 (1977). Michigan is one of two states which still retain statutory provisions creating a separate standard for the termination of parental rights of convicted parents. See "The Collateral Consequences of a Criminal Conviction," 23 Vanderbilt L Rev 929 at 1075 (1970).

Plaintiff submits that the statute at issue is unconstitutional in that it discriminates on its face between convicted felons and all other people. Under this provision, parental rights may be terminated, not on the basis of any showing of

abuse or neglect, but rather because of the parent's status as a convicted felon. Other provisions of the Michigan Juvenile Code provide protection to children who are threatened with abuse or neglect; they are, of course, equally applicable to prisoners and non-prisoners. The challenged provision adds nothing to the State's ability to protect children. Instead, it creates an additional and substantially harsher standard for the termination of parental rights of convicted felons than is applied to others. Such individuals may have their parental rights terminated regardless of the quality of care that they are able to provide their children. The statute also has a disparate impact on female felons, who are most often responsible for child care.

The offending portion of the statute is hopelessly vague and therefore violative of due process. Essentially, MCL 712A.19a(d), MSA 27.3178(598.19a)(d) sets forth two separate conditions under which a convicted person is subject to termination of parental rights: when the felony is "of a nature as to prove the unfitness of the parent"; and when the parent is "imprisoned for such a period that the child will be deprived of a normal home for a period of more than two years." Neither condition is further defined. The statute provides almost no guidance to parents or to courts in determining whether a given act by the parent will result in the termination of parent-child relationship. Depending on the inclinations of a given probate judge, any felony might be said to prove one's unfitness to have custody of a child.

There is no basis upon which to determine the level of proof required in order to prove unfitness in this context. Nor does the statute provide any assistance in determining when a court might rely upon the finality of a conviction. To the extent that the state relies upon the fact that a person is con-

victed of a felony as a basis for permanently depriving that person of a fundamental right, there must be some provision for the restoration of that right if the conviction is later reversed. Otherwise, an innocent individual may suffer an extraordinary consequence: the loss of his or her children because of an incorrect adjudication of guilt. The statute neither prevents this abhorrent result, nor provides a remedy when it occurs.

The second condition is similarly defective. The court is given no guidelines upon which it may rely in determining the meaning of "deprived of a normal home." It is hardly possible to imagine a more subjective term, or one more prone to differences in interpretation, than the term "normal home." See Davis v Smith, 583 SW2d 37 (Ark) 1979. Nor is there any reliable factual basis for a court to determine when an imprisonment will result in the child being deprived of a normal home for more than two years. With the prospect of a conviction being reversed and the possibility of parole or early release, there is no certainty that a parent sentenced to a two year term will actually be unavailable as a parent for that time period. MCL 712A.19a(d), MSA 27.3178(598.19a)(d) invites terminations based on personal prejudice and automatic application of sentence length provision.

The statute violates both the "fair notice" and "explicit standards" requirements of the void for vagueness test enunciated in Grayned v City of Rockford, 408 US 104 at 108-09, 92 S Ct 2294 (1971). The first clause of MCL 712A.19a(d), MSA 27.3178 (598.19a)(d), which refers to a "felony of a nature as to prove the unfitness of a parent..." bears a remarkable similarity to the Oklahoma Habitual Criminal Sterilization Act, which permitted sterilization of convicted felons for acts "amounting to felonies involving moral turpitude." The Oklahoma statute was unanimously

invalidated in Skinner v Oklahoma, 316 US 535, 62 S Ct 1110 (1942).

The statute is unconstitutional both on its face and as applied to Appellant Finney. The events giving rise to Ms. Finney's conviction occurred outside of the home and before Taurus was born. The events did not involve children, weapons, or physical violence. The record at trial establishes that Ms. Finney was eligible for release, based either on appellate reversal of her criminal conviction or on special parole, at the time of trial. 110-11A.

Because MCL 712A.19a(d), MSA 27.3178(598.19a)(d) permanently deprives parents of a fundamental right, the statute may be upheld only if it is narrowly drawn to address a compelling State interest. Roe v Wade, 410 US 113 at 153-56, 93 S Ct 705 (1973). While the State admittedly has a legitimate interest in protecting abused children, that interest does not provide a justification for this statute, since other provisions of the Juvenile Code permit the State to fully protect children at risk of harm. The State has no interest in discriminating against convicted parents.

The statute at issue has an impact far beyond its devastating impact on the Finney family in this case. The statute permits courts to overlook the necessity of jurisdictional findings and invites standardless terminations of inmates' parental rights. Both parents and children are injured by erroneous terminations and interminable appellate delays resulting from imprudent reliance on MCL 712A.19a(d)'s, MSA 27.3178(598.19a)(d)'s broadly permissive language. See In Re Curry, 113 Mich App 821, 318 NW2d 567 (1982); In Re Mudge, 116 Mich App 159, 321 NW2d 927; lv held in abeyance, 414 Mich 900, 322 NW2d 927 (1982); In Re Ortiz, Mich S Ct Docket #70376, lv den (1983); In Re Fair, Mich Ct App Docket

#68359, lv den (1983); In Re McIntyre, Mich Ct App Docket #68502, lv den (1983); see also Brief of Amici Curiae Prison Legal Services of Michgan, et al., 83-94A. MCL 712A.19a(d), MSA 27.3178(598.19a)(d) is unconstitutional both on its face and as applied.

2. THE CONSTITUTIONALITY OF THE ASSUMPTION OF JURISDICTION OVER THE CHILD.

A. MCL 712A.2(b), MSA 27.3178(589.2)(b), as construed by the Michigan Supreme Court, is unconstitutional.

Under the analysis of the three justices of the Michigan Supreme Court voting to affirm the lower court decision in this case, Taurus F. was within the jurisdiction of the Probate Court because she was "otherwise without proper custody" under MCL 712A.2(b), MSA 27.3178(598.2)(b). The affirming justices were able to support this finding through a radical, two-step interpretation of the statutory language. First, they held that the proposed placement of a child with a relative by an incarcerated parent is prima facie evidence of child neglect.* Second, the affirming justices shifted the burden of showing that the proposed alternative placement arrangements are suitable from the State to the parent.

The Court's reasoning, in creating an implication of jurisdiction in this case, is as follows. The fact that Ms. Finney was incarcerated constituted prima facie evidence that Taurus was "without proper custody." The burden then swung to Ms. Finney to show that there was a suitable alternative placement available.

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* "[T]he state makes a prima facie case that the child is 'otherwise without proper custody' when it shows that the parents or persons in actual custody are not providing proper custody." 415 Mich 556; 37A.

Through Ms. Thomas' testimony, it was established that an alternative placement was possible. However, Ms. Thomas expressed an interest in maintaining a good deal of control over the placement. Ms. Finney never expressly stated on the record her agreement with Ms. Thomas' plan. The affirming justices therefore conclude that Ms. Finney failed to meet her burden of proving that there was no disagreement between her and Ms. Thomas concerning placement. Based on an implied disagreement between the two sisters, the lower court could find that Ms. Thomas was not really available (because Ms. Finney might reject placement with her) and could properly proceed to terminate parental rights.

This inferred negative finding, upon which this termination of parental rights hinges, is entirely unsupportable from the record in this case. The State's amended petition reflects that "the mother claims one relative, Michelle Thomas, her sister, is willing as of the moment to take custody of the child." 75A. Ms. Thomas testified, without contradiction, that she and Ms. Finney had discussed her plans for Taurus and had agreed. 109A. Ms. Finney did not testify at trial. However, through counsel, from the outset of the jurisdictional proceeding through the closing at trial, Appellant Finney requested placement of Taurus with Michelle Thomas. 107A; 112A. See discussion at 415 Mich 544-45; 27-28A.

The statute, as interpreted by the affirming justices and as applied in this case violates Appellant Finney's rights to family privacy and due process of the law as secured by the First, Fifth, Ninth and Fourteenth Amendments.

(i) The proposed placement of a child with a relative is not <u>prima facie</u> evidence of child neglect.

This Court has never expressly determined the full scope of

constitutionally based family privacy protections, or their application to members of an extended family, in the parental rights termination context. However, the Court's treatment of family privacy issues in other contexts is a strong indication that a parent's right to place her child with a relative is entitled to constitutional protection.

In Moore v City of East Cleveland, 431 US 494, 97 S Ct 1932, 1976, four Justices of this Court recognized that the "private realm of family life which the state cannot enter", 431 US at 499, (quoting from Prince v Massachusetts, 321 US 158 at 166, 64 S Ct 438 (1944)), extends to relationships outside the nuclear family.

> The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.

431 US at 504. The importance of support from the extended family is particularly great among economically and emotionally distressed and non-white families. 431 US at 508-10, Brennan, J. concurring.

The family privacy right upheld in Pierce v Society of Sisters, 268 US 510, 45 S Ct 571 (1924) was the right to direct the upbringing of children by enrolling them in private schools outside the home. The family relationship constitutionally protected in Prince, supra, was the relationship of an aunt to her neice.

Courts in several states have held that a proposed placement with a relative defeats neglect jurisdiction. In Diernfeld v People, 137 Colo 328, 323 P2d 628 (1958), the Supreme Court of Colorado held that an inmate mother's proposed placement of her

child with the child's grandmother defeated dependency jurisdiction.

> Clearly it is not the law that before a child can be placed by a parent in the temporary custody of a relative permission must first be obtained from the court.

137 Colo 243, 323 P2d 631 (emphasis in the original). In In Re Valdez, 29 Utah 2d 63, 504 P2d 1372 (1973), the Supreme Court of Utah held that a placement of two children by an incarcerated father with the children's aunt and uncle vitiates dependency jurisdiction. The Valdez court held that, if there were disputes between relatives as to the proper placement of a child, those disputes should be resolved by those parties in a private custody proceeding. A familial dispute is not the basis for dependency jurisdiction. 504 P2d at 1375.

Until the affirmance of this case, Michigan courts followed the rule set forth in Diernfeld and Valdez.

> Most parents raise their children themselves. Some parents, however, because of illness, incarceration, employment or other reasons, entrust the care of their children for extended periods of time to others. This they may do without interference by the State so long as the child is adequately cared for.

In Re Weldon, 397 Mich 225 at 296, 244 NW2d 827 (1976), per Levin, J.; In Re Gould, 171 Mich 540, 137 NW 223 (1912); In Re Ward, 104 Mich 354, 304 NW2d 844 (1981), In Re Curry, 113 Mich App 812, 318 NW2d 567 (1982).

The decisions in Diernfeld, Valdez and the prior Michigan cases construe child neglect jurisdictional statutes to hold that the availability of a relative caretaker defeats dependency jurisdiction. These decisions are not explicitly based on constitutional provisions; however, they are implicitly constitu-

tionally grounded, since a construction of a jurisdictional statute which would permit the termination of parental rights when an adequate family placement is available would be unconstitutional. See Fritts v Krugh 354 Mich 97 at 114, 122; 92 NW2d 604 (1958); Santosky, supra, at 1397, n. 10.

The interpretation of MCL 712A.2(b), MSA 27.3178(598.2)(b) articulated by the justices for affirmance, which holds that a proposed placement with a relative by an incarcerated parent is prima facie evidence of child neglect places the State exactly where it may not be: in "the private realm of family life which the State cannot enter." Moore, supra, at 499.*

The difference in result between the justices for affirmance and the justices for reversal is clearcut. The justices for affirmance hold that the fact of Ms. Finney's incarceration creates a prima facie showing of improper custody; the justices for reversal would hold that "the parent had the right to transfer custody to her sister without court intervention" 415 Mich at 546, 29A. The interpretation of MCL 712A.2(b), MSA 27.3178 (598.2)(b) espoused by the affirming justices is unconstitutional because it impermissably abrogates both the parent's and the custodial relative's rights to family privacy secured by the First, Fifth, Ninth, and Fourteenth Amendments to the U.S. Constitution.

---

* Assuming arguendo that there was a disagreement between the sisters concerning the placement plan for the child, any dispute between family members as to the placement of a child may be resolved by the family without the involvement of the State or the risk that all family members will permanently lose all rights vis a vis the child. See MCL 722.21 et seq, MSA 25.312(1) et seq; Valdez, supra.

(ii) A state may not transfer the burden of producing evidence on the central element of the state's case in a parental rights termination proceeding.

The justices for affirmance interpret MCL 712A.2(b), MSA 27.3178(598.2)(b) to implicitly shift the burden of producing evidence to the parent in cases where it is alleged that a child is "without proper custody." When the State shows that a parent is unavailable

> the burden shifts to a parent to introduce evidence that other arrangements to provide proper custody have been made. The parent's argument that her sister, Michelle Thomas, would provide adequate care for the child was in the nature of an affirmative defense.

415 Mich at 556, 37A. Under the logic of the opinion, Ms. Finney had the burden of proving: (1) that her sister would provide care for Taurus; (2) that the care to be provided by the child's aunt would be "adequate"; and (3) that there was no disagreement between Ms. Finney and her sister concerning the terms of custody of Taurus. Appellant Finney apparently met her burden as to the availability and adequacy of Ms. Thomas' home. However, Ms. Finney did not affirmatively show the absence of a disagreement between her and her sister, and

> absent a showing of actual agreement, the probate court was justified in concluding that Taurus was without proper custody and that the Court had jurisdiction.

415 Mich at 556, 39A.*

---

* It is important to note that this disagreement is implied from a silent record. Neither the Probate Court nor the Supreme Court cites any evidence of a rejection of Ms. Thomas' plan by Ms. Finney. See 60A; Contrast 415 Mich 543-44, 27-28A.

The effect of the affirming justices evidentiary ruling is to shift the burden of proof entirely in "without proper custody" cases. Under the Opinion, Appellant Finney had an affirmative duty to disprove the State's case--that is, in the face of allegations that the child was "without proper custody," she was required to show that she had provided "proper custody" for the child. This is a radical departure from traditional practice, where the party bearing the burden of proof also bears the burden of producing evidence. McCormick, Evidence, 2nd ed., §337 (1972). By shifting this burden the court essentially creates a presumption that the parent is unfit. The Court's interpretation of MCL 712A.2(b), MSA 27.3178 (598A.2)(b), violates Ms. Finney's rights to due process of the law as secured by the Fifth and Fourteenth Amendments to the U.S. Constitution.

Last term, this Court held in Santosky v Kramer, supra, that states are required, as a matter of federal constitutional law, to prove parental unfitness by at least clear and convincing evidence in parental rights termination cases. 102 S Ct at 1393. The Court held that this burden of proof is required because of the congruence of the parent's and the child's interest at the termination hearing:

> At the factfinding, the State cannot presume that a child and his parents are adversaries. * * * [U]ntil the state proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship. Thus, at the factfinding, the interests of the child and his natural parents coincide to favor use of error reducing procedures.

102 S Ct at 1398. The Court noted that the State's numerous advantages in the parental rights context require it to bear this burden of proof.

> Permanent neglect proceedings employ imprecise substantive standards that leave determinations unusually open to the subjective values of the judge. See Smith v Organization of Foster Families, 431 US at 835, n. 36, 97 S Ct at 2105, n. 36. In appraising the nature and quality of a complex series of encounters among the agency, the parents, and the child, the court possesses unusual discretion to underweigh probative facts that might favor the parent. Because parents subject to termination proceedings are often poor, uneducated, or members of minority groups, id., at 833-835, such proceedings are often vulnerable to judgments based on cultural or class bias.
>
> The State's ability to assemble its case almost inevitably dwarfs the parents' ability to mount a defense. No predetermined limits restrict the sums an agency may spend in prosecuting a given termination proceeding. The State's attorney usually will be expert on the issues contested and the procedures employed at the factfinding hearing, and enjoys full access to all public records concerning the family. The State may call on experts in family relations, psychology, and medicine to bolster its case. Furthermore, the primary witnesses at the hearing will be the agency's own professional caseworkers whom the State has empowered both to investigate the family situation and to testify against the parents. Indeed, because the child is already in agency custody, the State even has the power to shape the historical events that form the basis for termination.

102 S Ct at 1399 (footnotes omitted).

The Court's reasoning in requiring that the state prove the elements of its case by clear and convincing evidence in the parental rights context applies equally to require that the State bear the burden of producing evidence on each element of its case. When a certain burden of proof is constitutionally required, a State may not, consistent with due process, effectively shift that burden of proof by classifying the elements of the State's case as affirmative defenses which must be raised by the parent. Mullaney v Wilbur, 421 US 684, 95 S Ct 1881 (1975).

The Michigan Supreme Court's "shifting burden" interpretation

of MCL 712A.2(b), MSA 26.3178(598.2)(b), also violates parents' rights to due process because the statute, as written, fails to give parents reasonable notice of their evidentiary burden. In his opinion reversing the termination of parental rights in Santosky, Justice Blackman emphasized that evidentiary standards must be clearly articulated prior to trial to prevent error, surprise, and prejudice.

> Since the litigants and the factfinder must know at the outset of a given proceeding how the risk of error will be allocated, the standard of proof necessarily must be calibrated in advance.

Santosky, supra, 102 US at 1390.

At the time of trial in the case at bar, Michigan Juvenile Court process was governed by rules which required the State to

> set forth any charges against a child, parent, or custodian with sufficient clarity and specificity to reasonably apprise them of matters concerning which court action is sought.

JCR 4.1; see also MCL 712A.11; MSA 27.3178(598A.11). Under prior Michigan decisions, the State was required to prove these charges by clear and convincing evidence in parental rights termination cases.

> [I]n the original hearing provided for by MCL 712A.12; MSA 27.3178(598.12), and in all subsequent review hearings provided for by MCL 712A.19; MSA 27.3178(598.19) and MCL 712A.19a; MSA 27.3178(598.19a) parental rights may not be terminated unless the State proves by clear and convincing evidence that such termination is warranted.

In the Matter of La Flure, 48 Mich App 377 at 386, 210 NW2d 482 (1973). The La Flure ruling was codified at JCR 8.3(b). Prior

to the ruling in the case at bar, probate courts were held to lack jurisdiction in "without proper custody cases" where the state failed to present evidence concerning the unfitness of a proposed relative placement. In re Curry, supra, 113 Mich App at 828-29.

The "shifting burden" interpretation of MCL 712A.2(b), MSA 27.3178(598.2(b) suggested by the justices for affirmance is neither explicitly stated in nor fairly implied from the Juvenile Code or the Juvenile Court Rules. Even if the State could constitutionally legislate such a rule,* it may not, ex post facto, create an evidentiary burden that could not be fairly anticipated at trial.

The Michigan Court's interpretation of MCL 712A.2(b), MSA 27.3178(598.2)(b) is unconstitutional. As interpreted it violates parents' rights to due process of the law by impermissably shifting the burden of proof to the parent on an essential element of the State's case and by imposing an evidentiary burden on parents not clearly expressed in or reasonably anticipated from the statute.

B. THE PROCEDURES THROUGH WHICH THE STATE ASSUMED JURISDICTION OVER TAURUS F. ARE VIOLATIVE OF DUE PROCESS.

The Probate Court's assumption of jurisdiction in this case is most notable for its callous disregard of Appellant Finney's procedural rights, as secured by Michigan law and the federal Constitution. The specific procedural rights of children and parents in juvenile court proceedings are set out in statute and court rule, but are also constitutionally grounded. See Kent v United States, 383 US 541, 86 S Ct 1045 (1966); Santosky, supra;

* Appellant Finney believes the State cannot constitutionally legislate such a rule. See pp. 24-26, supra.

In Re La Flure, supra; Reist v Bay County Circuit Judge, 396 Mich 326, 241 NW2d 55 (1976).

In her brief on appeal to the Michigan Supreme Court, Appellant Finney catalogued thirteen separate violations of Probate Court procedural rules in the Probate Court's handling of this case. See 95-102A. While each of these procedural violations might independently provide a basis for reversal, on this appeal, Appellant Finney stands on three claims:

(1) Despite the fact that Ms. Finney's location was known to the State and the fact that Taurus was not in physical danger or suffering through neglect or abuse, the Department sought and obtained jurisdiction over the child through an ex parte proceeding.

(2) Despite the fact that Ms. Finney submitted a written request for an adjournment to obtain counsel, the State proceeded with its case at the preliminary hearing when Ms. Finney was unrepresented.

(3) The State failed to disclose to the Court that it had received information favorable to Ms. Finney which would defeat jurisdiction.

(i) The ex parte assumption of jurisdiction.

At the time Taurus F. was born, Deborah Finney was an inmate under the jurisdiction of the Michigan Department of Corrections. Taurus was born on March 17, 1978. At the time Taurus was born, Michelle Thomas contacted the State to make arrangements to pick up Taurus. 108A.

On March 23, 1978, the State sought and obtained an ex parte order permitting the State to place the child in foster care. 69-71A.

At the time of the ex parte proceeding, the whereabouts of

Appellant Finney and Ms. Thomas were known to the State. At the time of the ex parte proceeding, Taurus F., who was a newborn patient at the University of Michigan's Womens Hospital, 69A, was not in danger or suffering abuse or neglect.

The State violated its own procedural rules in obtaining custody over Taurus through ex parte proceedings. JCR 3.1 permits the court to detain a child only if the current placement provisions "make immediate removal necessary."

> In the event one or more of the conditions set forth in Rule 3.1 is so serious that the interest of the child or society cannot be protected pending hearing by release to his parent, guardian, or custodian, the officer shall forthwith bring the child to the juvenile division of the probate court. The officer shall:
>
> (1) bring the child before the court and immediately take reasonable means to provide for the presence of his parent, parents, guardian or custodian, as provided by Rule 3.1.
>
> (2) file the custody or complaint statement provided by Rule 3.1 setting forth grounds and circumstances requiring detention or shelter care pending hearing, and details relating to notice to the parent, parents, guardian or custodian.

JCR 3.3(a). At the time the State obtained custody over Appellant Finney's child there was no allegation that the child was threatened by a "condition...so serious that the interest of the child or society cannot be protected pending hearing." JCR 3.3. The State could have taken "reasonable means to provide for the presence of his parent," JCR 3.3, at the initial hearing. No such attempt was made.

This Court has described "the central meaning of procedural due process" to be that

> Parties whose rights are to be affected are entitled to be heard; and in order that

> they may enjoy that right they must first be notified.
>
> * * *
>
> The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment--to minimize substantively unfair or mistaken deprivations of property.
>
> * * *
>
> If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented.
>
> * * *
>
> The Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect.

Fuentes v Shevin, 407 US 67 at 81-83, 92 S Ct 1983 (1972). What the Supreme Court observed in Fuentes regarding a consumer's right to notice when the constitutional loss at risk is the use of a stove and a stereo, 407 US 85, at n 14, must also apply when the litigant stands to lose a child. The State's ex parte assumption of jurisdiction over Appellant Finney's child in the absence of a record establishing a need for an emergency ex parte hearing violates her right to due process of the law.

(ii) The Right to Counsel.

After entering its ex parte order assuming custody of Ms. Finney's child on March 23, 1978, the Probate Court set a preliminary hearing, for April 3, 1978. 71A. Ms. Finney appeared at this hearing, without counsel. She presented the Court with a letter requesting an adjournment and appointment of counsel. The

letter was read into the record. 104-05A. The Court at first appears to grant Ms. Finney's request, but then goes on to permit the State to present its preliminary hearing testimony. 105-06A. At the subsequent hearing, Ms. Finney appeared with counsel, and denied the accuracy of the facts stated in the petition. At this hearing, the State was not required to present evidence and jurisdiction was continued.

Both by Court Rule, JCR 6, and by case law, Reist v Bay County Circuit Judge, supra, Michigan's Probate Courts are required to appoint counsel for indigent parents in parental rights termination proceedings. The Court's duty to advise parents of this right and the parents' right to representation begins "at the first hearing before the Court." JCR 6.1. This right, in Michigan, is constitutionally grounded. Reist, supra at 346, per Levin, J. Where there is a constitutionally based right to counsel, such counsel must be provided at each "critical stage" of the proceeding, and a preliminary or probable cause hearing constitutes such a critical stage. Coleman v Alabama, 399 US 1 at 9-10, 90 S Ct 1995 (1970). In Pointer v Texas, 380 US 400, 85 S Ct 1065 (1965), this Court reversed a criminal conviction where the defendant had not been represented by counsel and therefore had no opportunity to cross examine adverse witnesses at the preliminary hearing.*

The probable cause hearings found to be constitutionally significant in Coleman and Pointer were pre-trial proceedings. In Michigan Juvenile Court procedure, the initial jurisdictional proceedings are consolidated with the termination trial. In the case at bar, the Probate Court's termination order is explicitly premised on the April 3, 1978, jurisdictional findings. 41A.

* In Pointer, Justices Harlan and Stewart concurred to state that they would reach the same result on 14th Amendment due process grounds. 380 US at 408-11.

This Court's decision in Lassiter, supra, that the need to appoint counsel in termination proceedings may be determined on a case by case basis, 101 S Ct at 2162, does not relieve the State from its duty to provide counsel to Ms. Finney at the preliminary hearing in this case. Both the State of Michigan, as a matter of policy, JCR 6, and the Probate Court Referee hearing the case determined that Ms. Finney was entitled to counsel. 105A. Therefore, Ms. Finney's right to counsel must implicitly be considered constitutionally required under Lassiter. However, even if the right to counsel is viewed as a State-created right, constitutional rights are implicated. Once the State creates a right, that right "has real substance" and the Due Process clause may be invoked "to insure that the State created right is not arbitrarily abrogated." Wolff v McDonnell, 418 US 539 at 558, 94 S Ct 2963 (1974).

The State's denial of counsel to Ms. Finney at the April 3, 1978, preliminary hearing violates her right to due process of the law.

(iii) Duty To Disclose Favorable Evidence.

The State's ex parte assumption of jurisdiction, and its presentation of its jurisdictional case when Ms. Finney was without counsel might appear to be purely procedural violations. However, these procedural violations have had a great substantive impact in the case because of the State's failure to disclose to the court that Michelle Thomas was available to care for the child.

When Taurus was born, Michelle Thomas contacted the State to make arrangements to pick up the child. 108A. In its first three formal sworn statements to the court, the State failed to disclose that contact. In its original ex parte petition, in its

initial authorized petition, and in its April 3, 1978, testimony, the State failed to disclose to the Probate Court the potential availability of Michelle Thomas. 69-70A; 72A; 105-06A. In fact, the State twice alleges what it knew to be untrue: "that the known relatives are unable or unwilling to care to the child" 70A; 72A.

The State had a duty to disclose this information to the Court. The prosecuting attorney's office is statutorily required to prosecute child neglect complaints in Michigan. See MCL 722.623(5) and (6), MA 25.248(3); MCL 49.153, MSA 5.751. In these official duties,

> the responsibility of a public prosecutor differs from that of the usual advocate, his duty is to seek justice, not merely to convict.

Code of Professional Responsibility, E.C. 7-13. A prosecutor's failure to disclose to the Court evidence favorable to a criminal defendant constitutes a violation of due process. Brady v Maryland, 373 US 83, 83 S Ct 1194 (1963). Whether the constitutional right affected is liberty, as in Brady, or the fundamental right to family security, as in the case at bar, the prosecutor may not, consistent with due process, suppress favorable evidence.

The procedural violations evident from the record in this case are cumulative. The impact of the State's failure to disclose to the Court the availability of Michelle Thomas as a placement for the child would have been lessened if Appellant had been present at the first hearing or represented at the second. This Court has considered the cumulative effect of constitutional violations in determining whether litigants received hearings "in accord with traditional and fundamental standards of due

process." Chambers v Mississippi, 410 US 284 at 303, 93 S Ct 1038 (1973). In Chambers, the Court held that "under the facts and circumstances of [that] case" the defendant had been deprived of a fair trial. In the case at bar, the numerous and obvious violations of Appellant's constitutional rights require a similar conclusion.

CONCLUSION

For the reasons stated above, this Court should note probable jurisdiction of this appeal as to issues I through III and should grant certiorari as to issue IV.

Respectfully submitted,

Robert F Gillett

Robert F. Gillett (P29119)
Michigan Legal Services
Attorney for Appellant
900 Michigan Building
220 Bagley Avenue
Detroit, Michigan 48226
(313) 964-4130

Date May 17, 1983

CERTIFICATE OF SERVICE

Robert Gillett says that he served a copy of Respondent's Appearance, Jurisdictional Statement, and Motion to Proceed in Forma Pauperis, on:

Ellen Tickner
Child Advocacy Law Clinic
363 Legal Research Bldg.
U of M Law School
Ann Arbor, MI 48104

James Ridella
2664 Dalton
Ann Arbor, MI 48104

David King
Washtenaw County Prosecutor
City County Building
Ann Arbor, MI 48104

by mailing these documents to them by first class mail on May 17, 1983.

Robert F. Gillett

Subscribed and sworn to before me
this 17th day of May, 1983

Janet L. Newland, Notary Public
My Commission Expires: 9-17-86

IN THE SUPREME COURT

OF THE UNITED STATES

RECEIVED
MAY 18 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

DEBORAH RENE FINNEY,

Appellant,

v

MICHIGAN DEPARTMENT OF SOCIAL SERVICES,

Appellee.

(In re Taurus F., a Minor.)

82 6768

Michigan Supreme Court No. 65140

MOTION TO PROCEED IN FORMA PAUPERIS

Now comes appellant Deborah Rene Finney, through her counsel, Michigan Legal Services, and says:

1. She is petitioning for review of this cause and is unable, because of her poverty, to pay the costs of this appeal. See Affidavit in Support of Motion to Proceed on Appeal in Forma Pauperis, attached.

2. As a recipient of of public benefits under the Aid to Dependent Children program, appellant is, by operation of court rule, entitled to a waiver of fees and costs in Michigan. See Michigan General Court Rule 120.2.

3. Appellant was indigent at the time this action was filed and was represented by appointed counsel. Attachment A.

4. Appellant sought leave to proceed on appeal in forma pauperis from the Michigan Supreme Court. Her motion was granted by the Court through its order dated October 3, 1980. Attachment B.

Wherefore, appellant Deborah Rene Finney respectfully

requests that she be permitted to proceed on this appeal in forma pauperis.

Respectfully submitted,

Robert F Gillett

Michigan Legal Services
ROBERT F. GILLETT (P29119)
900 Michigan Building
220 Bagley Avenue
Detroit, MI 48226
(313) 964-4130

Date: May 13, 1983

State of Michigan,

The Probate Court for the County of ....WASHTENAW....

In the Matter of the ....TAURAS FINNEY....

At a session of said Court, held on the ....3rd.... day of ....April.... A. D. 1978

Present, Hon. ....FRANCIS L. O'BRIEN.... Judge of Probate.

REFEREE'S REPORT AND RECOMMENDATIONS:

PRESENT: Deborah Finney, mother
James Ridella, guardian ad litem
Donald Duquette, Supervising Attorney
Michael Sack, Student Attorney
Paul Thiefels, State Department of Social Services
Mary Fransen, State Department of Social Services
Ava Adler, court worker
Officer Rider, Washtenaw County Sheriff's Department
Officer Hulse, Washtenaw County Sheriff's Department

Preliminary hearing was held by the Referee on Petition 78-136, wherein the State Department of Social Services requests that the Court terminate the rights of the parents of the minor child. Testimony was taken from Mary Fransen, worker for the State Department of Social Services. She stated she has been in contact with the mother since January 1978; that the child was born on March 17, 1978 at Huron Valley Correctional Facility. Witness stated on information and belief that the mother has been incarcerated in prison on drug and weapon charges and will not be eligible for release before 1985; that the mother is still married to one James Crawford Finney, whose whereabouts are unknown, and that the biological father is one Martin Cowen aka Thaddeaus Russell who is incarcerated at Camp Cusino, Shingleton, Michigan and won't be eligible for release at least until May 1979. Witness stated that there are two other children in the family which are being taken care of by relatives, but they are not willing to take the above-named minor into their care.

The child's mother appeared with a written request for appointed counsel, and made no further statement.

Referee's Recommendations Concerning Findings and Disposition:

It is recommended that the filing of the petition be authorized.

It is further recommended that the Court find that the conditions or surroundings under which the child was found are such as to endanger his health, morals or welfare in that a prison for adults is not an appropriate place for the care and nurture of an infant; and that accordingly, the emergency placement of the child in temporary licensed foster care should be authorized and continued without prejudice to the rights of either parent. It is further recommended that counsel be appointed for the mother, that further hearing on the petition be held on Monday, April 10, 1978 at 2:00 in the afternoon and that notice of these proceedings be communicated by summons in the manner provided by law to James Crawford Finney and to Martin Cowen aka Thaddeus Russell.

Robert M. Barrie

ROBERT M. BARRIE
Referee

File No. .....

Att A, p. 1

SDSS

ORDER OF THE COURT

The above recommendations are approved.

IT IS NOW THEREFORE ORDERED that the above-named minor child be placed under emergency custody of the court, in licensed foster home care, under the supervision of the State Department of Social Services, until further order of the court;

IT IS FURTHER ORDERED that the above-named minor is not be be removed from this placement without permission of the Juvenile Division of the Probate Court, until further order of the court;

IT IS FURTHER ORDERED that counsel be appointed for the mother, Deborah Finney;

IT IS FURTHER ORDERED that summons be issued to James Crawford and to Martin Cowen aka Thaddeus Russell;

IT IS FURTHER ORDERED that the State Department of Social Services be authorized to pay the expenses incurred in such placement;

IT IS FURTHER ORDERED that hearing be adjourned to Monday April 10, 1978 at 2:00 in the afternoon.

FRANCIS L. O'BRIEN
Judge of Probate
Juvenile Division

rmb

cc: SDSS
mother
Child Adv.
gal
court worker
counsel for mother

FILED

APR 3 1978

JUVENILE REGISTER

pm

Att 4., p. 2

Room, in the City of Lansing, on the 3rd day of October in the year of our Lord one thousand nine hundred and eighty.

Present the Honorable

MARY S. COLEMAN,
Chief Justice.

THOMAS GILES KAVANAGH,
G. MENNEN WILLIAMS,
CHARLES L. LEVIN,
JOHN W. FITZGERALD,
JAMES L. RYAN,
BLAIR MOODY, JR.,
Associate Justices

CR 30-50
(30-50a)

In the Matter of Taurus Finney,
a minor

DEBORAH FINNEY,

Appellant.

S Ct: 65140
COA: 49862
LC: 78-15722

On order of the Court, the motion to proceed in forma pauperis is considered and it is GRANTED.

The delayed application for leave to appeal is considered, and while it is being considered, this Court, pursuant to GCR 1963, 865.1(7) REMANDS the case to the probate court for the county of Washtenaw for an evidentiary hearing and findings of fact by the probate judge as to (1) the current status of appellant, her sister, her husband, her daughter born March 17, 1978, and her daughter's natural father; (2) placement alternatives presently available. The probate judge also may make a present recommendation as to custody and placement. These findings and a transcript of proceedings are to be filed with the clerk of this Court within 60 days of the certification of this order.

We retain jurisdiction.

STATE OF MICHIGAN — ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 3rd day of October in the year of our Lord one thousand nine hundred and eighty.

IN THE SUPREME COURT

OF THE UNITED STATES

DEBORAH RENE FINNEY,

Appellant,

v

MICHIGAN DEPARTMENT OF
SOCIAL SERVICES,

Appellee.

(In re Taurus F., a Minor.)

Michigan Supreme Court No. 65140

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED

ON APPEAL IN FORMA PAUPERIS

I, Deborah Rene Finney, being first duly sworn, depose and say that I am the appellant-respondent in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are set forth in the Jurisdictional Statement concurrently filed in this cause.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

No. I was incarcerated in various prisons under the jurisdiction of the Michigan Department of Corrections from late 1977 until early in 1982. When I left prison, I was being

paid $1.05 per day at my prison job working in the prison heating plant.

I have not been employed since my release from prison.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

No. My sole source of income for the past twelve months has been public assistance benefits under the Aid to Dependent Children (ADC) program. My current monthly benefit amount is $332.00 per month.

3. Do you own any cash or checking or savings account?

No.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

No.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Alayo Finney, age 14, my son, is dependent on me.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Deborah Rene Finney

Subscribed and sworn to before me this 19th day of May, 1983.

Notary Public
My Commission Expires: 9-17-86

IN THE SUPREME COURT

OF THE UNITED STATES

DEBORAH RENE FINNEY,

Appellant,

v

MICHIGAN DEPARTMENT OF
SOCIAL SERVICES,

Appellee.

(In re Taurus F., a Minor.)

Michigan Supreme Court No. 65140

ORDER PERMITTING APPELLANT TO
PROCEED IN FORMA PAUPERIS

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1982

DEBORAH RENE FINNEY,

Appellant,

v

MICHIGAN DEPARTMENT OF SOCIAL SERVICES,

Appellee.

* * * * * *

(In re Taurus F., a Minor.)

APPENDIX TO JURISDICTIONAL STATEMENT

ATTORNEY FOR APPELLANT

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STATE OF MICHIGAN

SUPREME COURT

IN THE MATTER OF TAURUS F.,
A MINOR
_____/

Michigan Supreme Court No. 65140

NOTICE OF APPEAL

Please take note that Deborah Rene Finney, Respondent in the Trial Court and Appellant in the Michigan Supreme Court, hereby appeals from the decision of the Michigan Supreme Court dated December 23, 1982, rehearing denied by Order entered February 22, 1983.

This is an appeal as of right pursuant to 28 USC §1257(2). Appellant also seeks a writ of certiorari to the Michigan Supreme Court pursuant to 28 USC §1257(3) to review constitutionally grounded procedural errors of the lower courts.

May 13, 1982.

RF Gillett

MICHIGAN LEGAL SERVICES
By: Robert F. Gillett (P29119)

900 Michigan Building
220 Bagley Avenue
Detroit, MI 48226
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IN THE SUPREME COURT

OF THE UNITED STATES

IN THE MATTER OF TAURUS F.,
A MINOR
_____/

Michigan Supreme Court No. 65140

PROOF OF SERVICE

Reta C. Lewis, says that she served a copy of Respondent's Notice of Appeal on:

Ellen Tickner
Child Advocacy Law Clinic
363 Legal Research Bldg.
U of M Law School
Ann Arbor, MI 48104

James Ridella
2664 Dalton
Ann Arbor, MI 48104

Corbin R. Davis
Clerk of the Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

Clerk of the Washtenaw County Probate Court
2270 Platt Road
Ann Arbor, MI 48104

by mailing this document to them by first class mail on May 13, 1983. I here certify that all parties required to be served with this notice have been served.

Reta C. Lewis

Reta C. Lewis

Subscribed and sworn to before me
this 13th day of May, 1983

Janet L. Newland

Janet L. Newland, Notary Public
My Commission Expires: 9-17-86

released at the time the opinion is rendered. This syllabus is not part of the opinion of the Court but has been written by the Reporter of Decisions as a summary of the case for the convenience of readers. See United States v Detroit Lumber Co, 200 US 321, 337; 26 S Ct 282; 50 L Ed 499 (1906).

IN THE MATTER OF TAURUS F.

Docket No. 65140. Argued October 13, 1981 (Calendar No. 3).--Decided December 23, 1982.

The Department of Social Services petitioned the Washtenaw Probate Court to terminate the parental rights of Deborah Finney with respect to her daughter, Taurus, alleging that Mrs. Finney was unable to care for the child because she was in prison. At the time, the child was under foster care. Mrs. Finney contested the petition, and her sister, Michelle Thomas, offered to care for the child. The department investigated Ms. Thomas' home and found it to be suitable for foster care but unsuitable as an adoptive home, and refused to place the child in the home even for foster care. The department amended its petition and sought termination of parental rights on the grounds that Mrs. Finney was an unfit parent and that the child would be deprived of a normal home for more than two years because Mrs. Finney was in prison. Following trial, the probate court, Francis L. O'Brien, J., terminated Mrs. Finney's parental rights. The Washtenaw Circuit Court, Henry T. Conlin, J., affirmed. The Court of Appeals, D. F. Walsh, P.J., and D. E. Holbrook, Jr., and R. B. Burns, JJ., denied leave to appeal (Docket No. 49862). On appeal by Deborah Finney, the Supreme Court twice remanded the case to the probate court for findings of fact and recommendations for placement and for explication of the bases for the probate court's assumption of jurisdiction and disposition of the case.

The decision of the courts below is affirmed by an equally divided Court.

Justice Williams, joined by Justices Kavanagh and Levin, would hold:

The probate court did not have jurisdiction in the case and was without authority to terminate parental rights.

1. The probate court is a court of limited jurisdiction. Before the court may consider termination of parental rights, its jurisdiction must be established. Under the Probate Code, the court has jurisdiction in proceedings concerning a child under 17 years of age who is without proper custody. In this case, no showing was made that the child was without proper custody.

2. A parent may place a child in the custody of a relative without intervention by the probate court, and the custody can be proper custody under the Probate Code where the child is adequately cared for. The provision of necessary support, education, and the care necessary for the health, morals, and well-being of the child is proper custody. Such custody is further characterized by the absence of neglect, cruelty, drunkenness, criminality, or depravity. Both temporary and permanent custody can be proper custody; it is the adequacy of the care given the child, rather than the nature of the placement which establishes proper custody. In this case, permanent placement of the child by Mrs. Finney with her sister would not be improper custody per se, nor would custody based on an agreement between Mrs. Finney and her sister conditioning placement on the sister's right to decide when and if the child should be returned to Mrs. Finney's custody.

3. The Department of Social Services had the burden of establishing that the child was without proper custody. The department's pleadings are inconsistent with respect to the existence of a custody agreement between Mrs. Finney and her sister. Originally, the department alleged that Mrs. Finney's relatives were unable or unwilling to care for the child. In

its amended petition, it alleged that Michelle Thomas was willing to take custody of the child and that Mrs. Finney approved, but that Mrs. Thomas was unsuitable. The probate court found that no evidence was presented that Mrs. Finney agreed to conditions set by Ms. Thomas relative to taking custody of the child. The finding is legally insufficient to establish lack of proper custody and, thus, jurisdiction in the probate court. As long as it is not known whether the mother consented to her sister assuming custody, the department did not establish that proper custody was not available. Affirmative proof of the mother's refusal to consent is necessary. The department's determination that Ms. Thomas was not suitable for adoption also does not establish that the child was without proper custody. The Probate Code does not provide that suitability for adoption is a relevant criterion for providing proper custody.

Justice Coleman, joined by Chief Justice Fitzgerald and Justice Ryan, would hold:

1. The state makes a prima facie case that a child is otherwise without proper custody under the juvenile chapter of the Probate Code when it shows that the parents or persons in actual custody of the child are not providing proper custody, and the burden shifts to the parents to show that other arrangements to provide proper custody have been made.

2. A parent may legally place a child in a relative's custody prior to intervention by the probate court. However, where, as in this case, the parent cannot provide proper custody and no agreement with a relative for permanent custody has been made, the probate court is justified in concluding that the child is without proper custody and assuming jurisdiction.

3/October 1981

STATE OF MICHIGAN

SUPREME COURT

FILED DEC 23 1982

IN THE MATTER OF TAURUS F.

A Minor

DEBORAH FINNEY;

Respondent-Appellant

No 65140

MICHIGAN DEPARTMENT OF SOCIAL SERVICES,

Petitioner-Appellee

BEFORE THE ENTIRE BENCH (except Riley, J.).

WILLIAMS, J.

INTRODUCTION

This is a case of first impression concerning the termination of parental rights. It considers the right of a mother to give custody of her child to a sister without court intervention, and the character that such custody may take. It also considers what criteria must be applied to establish probate court jurisdiction on the basis that the child in question is "otherwise without proper custody" under MCL 712A.2(b); MSA 27.3178 (598.2)(b).[1]

The case arises from the efforts of a mother who gave birth to a child while incarcerated to place that child in custody with the mother's sister. The sister was willing to accept custody, but only on the condition that the sister be allowed to retain permanent custody or until she thought the mother was sufficiently rehabilitated to properly care for the child.

The case raises four novel issues involving the interpretation of MCL 712A.2(b); MSA 27.3178(598.2)(b), which establishes the criteria for a probate court taking jurisdiction over a child. The probate court must establish its jurisdiction before

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1. The text of this provision is set out below, p 13.

before it may consider termination of parental rights. Specifically, all four issues involve interpretation of the criterion for jurisdiction that the child is "otherwise without proper custody".

These four novel issues are:

(1) May custody in the mother's sister constitute "proper custody"?

(2) May permanent or conditionally permanent custody constitute "proper custody"?

(3) May the state satisfy the criterion "otherwise without proper custody" by the probate court finding that "there was no evidence presented at trial that Deborah F__ [the mother] agreed to Ms. Thomas' [the sister's] conditions" of custody?

(4) May the state prove that the sister is not a "proper" custodian by showing that the sister's home was not suitable for adoption?

The facts and record in this case are both somewhat difficult and muddled for four reasons. First, factually, the probate court found it difficult to ascertain definitively under what conditions the sister would accept custody and whether the mother was agreeable to those conditions. Second, legally, the probate court did not directly address whether the sister could take custody under the conditions she set. Third, legally, there did not appear to be a clear understanding that the criterion for whether the sister was suitable for "proper custody" was established by § 2(b) rather than the criteria for foster care or for adoption. Fourth, and pervasively, the probate judge seemed not to recognize that the mother could give her sister custody without court intervention and that his duty was to try to establish his jurisdiction by affirmatively finding that the sister's custody was improper under § 2(b) rather than to determine whether he should grant the sister custody as a court-approved foster parent or as an adoptive parent.

We hold: (1) that custody in a sister may constitute proper custody under § 2(b); (2) that custody in the sister with the mother's consent may constitute "proper custody" even though

it is permanent custody with the right to decide when and if the child shall be returned; (3) that, since the state must affirmatively establish the basis for jurisdiction, the state must affirmatively prove non-consent of the mother; as a consequence the probate judge's finding that there was no testimony as to the mother's consent is insufficient to establish jurisdiction; (4) that the phrase "otherwise without proper custody" refers to "proper custody" under § 2(b), and since the probate judge appears to have employed not that but a different standard, namely whether the sister's home was suitable for adoption, the probate judge did not establish that the child was "otherwise without proper custody". In short, the probate court in this case did not acquire jurisdiction because the child was not shown to be "otherwise without proper custody".

Since the state did not properly establish jurisdiction, the probate court was without authority to proceed to terminate parental rights. Therefore, it is not appropriate for this Court to consider whether the probate court properly terminated parental rights under MCL 712A.19a(d); MSA 27.3178(598.19a)(d)[2] or whether § 19a(d) is constitutional.

I. STATEMENT OF FACTS

The parties agreed with, and the probate judge signed, the following concise statement of facts. (Appellant's Appendix pp 108a-110a)

"I. EVENTS

"1. In December, 1977, Mrs. Deborah Finney, the appellant, was referred to the Michigan Department of Social Services by the Michigan Department of Corrections, for the reason that she was pregnant and in prison.

"2. On March 17, 1978, a daughter, Taurus, was born to Deborah Finney at the University of Michigan Hospital, Ann Arbor, Washtenaw County, Michigan.

"3. Initially, Ms. Thomas, appellant's sister, was unwilling to take the child. The record indicates that she changed her mind, although she indicated that there were some conditions to this.

"4. On March 23, 1977, the Department of Social Services obtained an ex-parte order from the Washtenaw County Probate

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2. The text of this provision is set out below, p 5.

Court, Juvenile Division, giving them authority to place Taurus in foster care.

"5. The Department of Social Services then filed a petition for termination of parental rights in the Washtenaw County Probate Court on March 29, 1978, which alleged that Deborah Finney was unable to care for the child or to provide care through relatives.

"6. On April 3, 1978, a preliminary hearing was held in the Washtenaw County Probate Court, Juvenile Division. Mrs. Finney was unrepresented and made no statements except to request counsel. Mary Fransen, a student intern at the Department of Social Services, was the only person who testified. She testified that no relatives were able to care for Taurus Finney. The child was continued in foster care.

"7. At a second hearing, on April 10, 1978, Deborah Finney contested the termination, and Michelle Thomas declared that she was willing to care for Taurus.

"8. The hearing on April 10 was adjourned upon the agreement of the Department of Social Services, the guardian ad litem, and Deborah Finney, that a foster care study of Ms. Thomas' home would be undertaken.[3]

"9. The Department of Social Services' foster care study found Ms. Thomas' home to be suitable for foster care placement.

"10. The Department of Social Services later did an adoption study of Ms. Thomas' home and found the home to be unsuitable as an adoptive home site on the grounds that Ms. Thomas was in the process of obtaining a divorce, that she already had custody of three children, that she worked full time, and that she lacked a permanent and reliable babysitter.[4]

"11. The Department of Social Services refused to place Taurus Finney in Ms. Thomas' home on a foster care basis even though the home was found suitable by Department of Social Services' own foster care study.

"12. The Department of Social Services amended its petition on July 18, 1978, and for the first time alleged that termination should take place because the mother had been convicted of felonies which proved her unfitness as a parent and, because she was imprisoned for a period of time, the child would be deprived of a normal home for more than two years, MCL 712.19a(d); MSA 27.3198(598.19a)(d). Exhibit C.

"13. A trial was held on July 31, 1978, and the probate judge terminated Mrs. Finney's rights for the reasons set forth in the amended petition.

"14. At trial, the guardian ad litem recommended against termination of the parental rights of the parents.

"15. Deborah Finney appealed the decision to the Washtenaw Circuit Court.

"16. At the trial, the guardian ad litem, James Ridella, recommended that temporary custody be continued, but not termina-

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3. While the department did find Ms. Thomas' home suitable for foster care, it should be noted that unsuitability for foster care or adoption is not the same thing as "otherwise without proper care" under § 2(b). See Part VI, below.

4. See fn 3.

tion of parental rights. On appeal the guardian ad litem changed his position and recommended that the termination be upheld.

"17. The decision of the Washtenaw Circuit Court, affirming the probate court's decision, was signed on October 26, 1979. It was filed on October 31, 1979, and the clerk's notice was mailed on November 6, 1979.

"18. On November 21, 1979, an order signed by Judge Conlin granted appellant an extra 20 days in which to file her appeal.

"II. PERSONAL FACTS

"19. Mrs. Finney has two other children, a son being cared for by her grandparents and a daughter being cared for by her sister, Michelle Thomas. She sees both children on a regular basis.

"20. Deborah Finney saw her daughter Taurus two or three times at the prison before the hearing at which her parental rights were terminated.

"21. Deborah Finney is presently at Huron Valley Correctional Facility with an 'out date' of June, 1983.

"22. Deborah Finney was convicted of carrying a concealed weapon in 1973, and attempted possession of heroin and delivery of heroin in August, 1977."

The evidence offered at the trial also showed that Mrs. Finney had two other children, Aleka, a daughter born in 1976, born addicted to heroin or methadone, and a son, Alayho, born in 1968. Taurus, her third child and the subject of these proceedings, was conceived after Mrs. Finney escaped from prison. The natural father, Martin Cowens, was also incarcerated. Deborah Finney was married to James Finney when Taurus was conceived and born. However, he has been absent for some time, and his whereabouts are unknown.

The probate court issued its opinion and order on August 24, 1978. The probate court concluded that the material allegations in the petition were substantiated, that the child was within the court's jurisdiction on the basis of § 2(b), subds (1) and (2), and that the parental rights of Deborah Finney, Martin Cowens, the putative father, and James Finney, the legal father, should

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5. Sec. 19a. Where a child remains in foster care in the temporary custody of the court following the initial hearing provided by section 19, the court may make a final determination and order placing the child in the permanent custody of the court, if it finds any of the following:

* * *

"(d) A parent or guardian of the child is convicted of a felony of a nature as to prove the unfitness of the parent or guardian to have future custody of the child or if the parent or guardian is imprisoned for such a period that the child will be deprived of a normal home for a period of more than 2 years."

be terminated pursuant to MCL 712A.19a(d); MSA 27.3178(598.19a)-(d).[5] It is important to note that the mother, Mrs. Finney, is the only person that has appealed the termination of parental rights to this Court. Therefore, we do not address any of the possible errors with respect to the termination of parental rights of the biological father and the legal father.

The probate court's decision was appealed to the Washtenaw Circuit Court, and, on October 26, 1979, the circuit court upheld the decision to terminate parental rights. The circuit court concluded that the probate court acted properly in finding that it had jurisdiction and did not abuse its discretion in its evaluation of the evidence presented. It found that there was sufficient evidence to establish the jurisdiction of the probate court as there was not conclusive evidence that the child's aunt was available to care for the child.[6] Once the circuit court decided the jurisdictional issue under MCL 712A.2(b); MSA 27.3178-(598.2)(b), it reviewed the dispositional phase, i.e., the termination of parental rights, and concluded that parental rights were properly terminated pursuant to the second criterion of MCL 712A.19a(d); MSA 27.3178(598.19a)(d). The court found that the parent was "imprisoned for such a period that the child will be deprived of a normal home for a period of more than 2 years". The court found first that the child was without a normal home at that time and second that given the mother's sentence she would not be released until 1985, thus depriving the child of a normal home for more than two years. The circuit court concluded that it was unnecessary to review the first criterion of § 19a(d), "[a] parent or guardian of the child is convicted of a felony of a nature as to prove the unfitness of the parent or guardian to have future custody of the child" as there was a sufficient basis for terminating the parental rights under the second criterion.

The Court of Appeals denied leave to appeal on April 23, 1980, for the reasons stated in the opinion of the circuit judge.

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6. We hold this conclusion to be legally erroneous. See below, Part V.

Deborah Finney then filed an application for leave to appeal in this Court. On October 3, 1980, this Court stated:

"On order of the Court, the motion to proceed in forma pauperis is considered and it is granted.

"The delayed application for leave to appeal is considered, and while it is being considered, this Court, pursuant to GCR 1963, 865.1(7) remands the case to the probate court for the county of Washtenaw for an evidentiary hearing and findings of fact by the probate judge as to (1) the current status of appellant, her sister, her husband, her daughter born March 17, 1978, and her daughter's natural father; (2) placement alternatives presently available. The probate judge also may make a present recommendation as to custody and placement. These findings and a transcript of proceedings are to be filed with the clerk of this Court within 60 days of the certification of this order."

A hearing on remand was held in January of 1981, and the probate court's findings of fact and recommendations were filed on February 2, 1981. The probate court stated that "[i]t is the court's unqualified recommendation that Taurus should remain in the foster home and that adoption should be pursued". We granted leave to appeal on March 27, 1981, and the matter was argued before us on October 13, 1981.

On July 7, 1982, this case was once again remanded to the probate court. The probate court was directed to explicate the basis for its assumption of jurisdiction pursuant to MCL 712A.2(b); MSA 27.3178(598.2)(b) and for its disposition of this matter pursuant to MCL 712A.19(d); MSA 27.3178(598.19a)(d). The probate court was specifically "directed to make findings of fact concerning the propriety of a possible temporary * * * or permanent placement [with the child's aunt]".[7]

The findings of fact and explication of the court were received by this Court on September 7, 1982, and an amendment was received on September 9, 1982. Aided by the amplification by the probate judge of the record below, we proceed to consider the difficult issues presented by this case.

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7. This language "propriety of a possible temporary * * * or permanent placement [with the child's aunt]" was meant to require the probate court to make findings of fact whether temporary or permanent custody by the aunt would constitute "proper custody". The order's choice of language was unfortunate, however, because the word "placement" was sufficiently ambiguous to refer to placement by the mother or placement by the court. This Court had in mind placement by the mother, but the probate court very well may have interpreted it to mean placement by the court. See below, p 24.

In passing, we are compelled to observe that, inasmuch as it is psychologically and socially of extreme concern that the child find proper placement with the parent(s) or a relative, or foster care, or in adoption in the shortest possible period of time, it is essential that the probate court not only act expeditiously, but with meticulous regard for all statutory requirements so as to (1) protect all rights and (2) avoid the possibility of appeal or (3) if appeal is necessary, have such a complete record with specific and substantiated findings that there can be accurate and swift appellate determination without appellate speculation as to the facts from not only a cold but also an incomplete record.

II. NECESSITY OF A PROBATE COURT'S JURISDICTION

A. The Law

The probate court cannot consider termination of parental rights without first establishing jurisdiction.[8] The probate court is a court of limited jurisdiction. Its authority is derived from the Michigan Constitution and the Legislature through statutory enactments. Fritts v Krugh, 354 Mich 97; 92 NW2d 604 (1958).

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8. In its wisdom, the Legislature has developed the following statutory scheme to deal with the unfortunate situations that arise which may necessitate the termination of parental rights. When the juvenile division of the probate court receives information from any person alleging that a child falls within the statutory provisions of chapter 12A of the Probate Code of 1939, MCL 712A.1 et seq.; MSA 27.3178(598.1) et seq., which are designed to handle juvenile problems, the court may conduct a preliminary inquiry "to determine whether the interests of the public or of the child require that further action be taken". MCL 712A.11; MSA 27.3178(598.11). If the court concludes that formal jurisdiction should be acquired, the court authorizes a petition to be filed. Following any further investigation that the probate court deems necessary, the court may dismiss the petition or issue a summons requiring the person or persons who have custody or control of the child to appear before the court. If such person is other than the parent or guardian of the child, then the parent or guardian shall also be notified of the petition and hearing. MCL 712A.12; MSA 27.3178(598.12). Hearings are then held to determine whether the probate court has jurisdiction under MCL 712A.2; MSA 27.3178(598.2). If the determination is affirmative, the probate court may proceed and order such disposition as seems appropriate under the factual situation presented. MCL 712A.18; MSA 27.3178(598.18), MCL 712A.19a; MSA 27.3178(598.19a). In the

(Footnote continued next page)

Article 6, § 15 of the Michigan Constitution of 1963 provides:

"The jurisdiction, powers and duties of the probate court and of the judges thereof shall be provided by law. They shall have original jurisdiction in all cases of juvenile delinquents and dependents, except as otherwise provided by law."

The pertinent statutory provision, MCL 712A.2(b); MSA 27.3178(598.2)(b), reads:

"Sec. 2. Except as provided herein, the juvenile division of the probate court shall have:

* * *

"(b) Jurisdiction in proceedings concerning any child under 17 years of age found within the county

"(1) * * * who is otherwise without proper custody". (Emphasis added.)

B. The Pleadings

The initial petition[9] in this case was filed on March 29, 1978, and provides in relevant part the following facts:

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8. (Footnote continued)

order for disposition, the probate court is required to state whether the child is placed in the temporary or permanent custody of the court. If the child is placed in the permanent custody of the court, all parental rights are terminated. MCL 712A.20; MSA 27.3178(598.20). When the child is placed in temporary custody of the probate court, hearings must be held periodically to determine whether the child is to remain in foster care or whether consideration should be given to permanent placement. See MCL 712A.19; MSA 27.3178 (598.19).

9. The petition must conform to the statutory requirements of MCL 712A.11; MSA 27.3178(598.11) which provides:

"The petition shall be verified and may be upon information and belief. It shall set forth plainly the facts which bring said child within the provisions of this chapter, and shall state (1) the name, birth date, and residence of the child; the names and residence: (2) of the parents; (3) of his legal guardian, if there is one; (4) of the person or persons having custody or control of the child; and (5) of the nearest known relative if no parent or guardian can be found. If any of the facts herein required are not known to the petitioner, the petition shall so state. If the child attains his seventeenth birthday after the filing of the petition, the jurisdiction of the court shall continue beyond his seventeenth birthday and the court shall have authority to hear and dispose of the petition in accordance with the provisions of this chapter."

The petition contains the name, birth date and residence of the child and the names and residence of her parents as required by this statute.

"I [Paul Thiefels, caseworker] further represent upon information and belief that said child _____, on or about, to-wit, the 28th day of March, A. D. 1978, in said County of Washtenaw comes within the provisions of Act No. 54, Public Acts of Michigan, 1944, First Extra Session as Amended: being MCL 712A.2(b) whose parent legally responsible for the care and maintenance of such child, when able to do so, neglects or refuses to provide proper or necessary support, or who is otherwise without proper custody or guardianship to wit: the mother is presently detained in the Huron Valley Women's Facility; that the mother will remain incarcerated at least until 1985; that the mother is unable to provide adequate care for the child through relatives; that the known relatives are unable or unwilling to care for the child; that the putative father of the child is incarcerated at Camp Cusino in Shingleton, Michigan; that the putative father will remain incarcerated until May, 1979; that the best interest of said child requires termination of parental rights and placement for adoption. Said child is therefore subject to proceedings under Chapter XIIA, § 2(b) of the Probate Code." (Emphasis supplied.)

The original petition was amended on July 18, 1978, and further states:

"I further represent upon information and belief that said child _____, on or about, to-wit, the 18th day of July, A. D. 1978, in said County of Washtenaw comes within the provisions of Act No. 54, Public Acts of Michigan, 1944, First Extra Session, as Amended: whose parent legally responsible for the care and maintenance of such child, when able to do so, neglects or refuses to provide proper or necessary support, or who is otherwise without proper custody or guardianship to wit: that the mother has been convicted of felonies such as possession of dangerous weapons and drugs; that the mother is presently detained in the Huron Valley Women's Facility; that the mother will remain incarcerated at least until 1985, in excess of two years; that the mother claims one relative, Michelle Thomas, her sister, is willing as of the moment to take custody of the child that placement with this aunt is unsuitable for reasons that the aunt is in the process of obtaining a divorce, has custody of three young children, works full time, and lacks a permanent and reliable babysitter; that given these circumstances the aunt is incapable of providing adequate care and supervision for a four-month-old child; that the biological father has been convicted of felonies such as attempted armed robbery and possession of dangerous drugs; that he will be subject to incarceration until May, 1979; that pursuant to § 19a(d), of Chapter XIIA, of the Probate Code the parents' respective convictions of the aforementioned felonies establishes their unfitness as parents; that the best interest of said child requires termination of parental rights in this proceeding and placement for adoption. Said child is therefore subject to proceedings under Chapter XIIA, § 2(b) of the Probate Code." (Emphasis supplied.)

The parties proceeded pursuant to the original and amended petitions,[10] and both were considered by the probate court. There were hearings in March, April, and June. Trial began July 31.

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10. The guardian ad litem states:

"The matter went to trial, based on both the original and amended petitions." (Brief, p 2)

C. Probate Court Action

On August 24, 1978, the probate court issued the following opinion and order:

"The mother of the above-named minor was convicted of delivery of heroin and possession of dangerous weapons. She is incarcerated in the Huron Valley Women's Facility and will be so incarcerated until at least 1985. During the period of her sentence the mother escaped from the correctional institution, and the above-named minor was conceived [sic] by Martin Cowans, also known as Thaddeus Russell. The above-named putative father has been convicted of possession of heroin and will not be released from minimum security until 1979. Testimony indicated that James Crawford Finney, husband of Debra Finney and legal father of Taurus F _____, has been absent and his whereabouts unknown for several years.

"The Department of Social Services, Protective Services, by its worker, Paul Thiefels, filed a petition requesting termination of parental rights. The child was born on March 17, 1978, at the Huron Valley Correctional Facility, located in Washtenaw County.

"On April 3, 1978, after a hearing before the referee, Robert M. Barrie, the court found that the conditions and surroundings under which the child was found are such as to endanger her health, morals or welfare, in that a prison for adults is not an appropriate place for the care and nurture of an infant, and the child was ordered placed in foster care under the supervision of the Department of Social Services.

"On July 31, 1978, a hearing was held and testimony taken concerning the neglect petition filed by the State Department of Social Services. The Court finds that the material allegations contained in the petition have been substantiated and further finds that the said child is within the jurisdiction of the court on the basis of § 2(b), subds (1) and (2).

"Disposition

"The court finds that both the natural mother and the putative father were convicted of felonies of a nature to prove their unfitness to have the future custody of the child, that both are imprisoned for a period, and that the child will be deprived of a normal home for a period of more than two years. The mother will not be released from prison until 1985, and the father might be released in 1979; but, it is the opinion of the court that given their propensities to crime, their past convictions, and their unmarried state, if the child were placed with them, she would be deprived of a normal home for a period of more than two years.

"It is therefore ordered that all the parental rights of Debra Finney, also known as Michelle Hooks, Martin Cowens, also known as Thaddeus Russell, and James Crawford Finney, are hereby terminated."

D. Discussion

The probate court's opinion and order endeavored to meet the necessary statutory criteria. First, the third paragraph beginning "On April 3, 1978" makes a finding to establish the right of the probate court to take interim emergency custody of the child Taurus, presumably under MCL 712A.14; MSA 27.3178(598.14).[11] This section permits immediate custody of a child, inter alia, where "surroundings are such as to endanger his health, morals or welfare". Second, the next paragraph beginning "On July 31, 1978" refers to the justification for taking jurisdiction. Third, the final paragraph relates to findings necessary to terminate parental rights under MCL 712A.19a(d); MSA 27.3178 (598.19a)(d) relating to a parent's incarceration.

At this juncture our consideration concerns the paragraph on jurisdiction. The probate court's findings of fact and conclusion of law are thus tersely stated:

"The court finds that the material allegations contained in the petition have been substantiated and further finds that the said child is within the jurisdiction of the court on the basis of § 2(b) subds (1) and (2)."

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11. Actually it is impossible to tell under what authority the probate court took temporary custody of Taurus. The probate court order following the above mentioned April 3, 1978, hearing does not specify whether it was acting under § 14 or § 15. Section 14 provides for a police or similar officer taking emergency custody of a child without prior court authorization. The fact the probate court in this instance issued an order relative to custody tends to argue it was operating under § 15, not § 14. But § 15 requires as a predicate to court action the filing of a complaint or petition. It does not appear in the court order or elsewhere in the record that such a complaint or petition was filed prior to the issuance of the order. As a consequence, it may be more appropriate to treat the action as a § 14 action, even with the intervention of the court. The use in the opinion and order of the § 14 language "such as to endanger [her] health, morals or welfare" in part supports that conclusion.

The pertinent text of MCL 712A.14; MSA 27.3178(598.14) follows:

"Sec. 14. Any municipal police officer, sheriff or deputy sheriff, state police officer, county agent or probation officer of any court of record may, without the order of the court, immediately take into custody any child who is found violating any law or ordinance, or whose surroundings are such as to endanger his health, morals or welfare."

The full text of § 2(b), subds (1) and (2) for convenience is herewith set forth:

"(b) Jurisdiction in proceedings concerning any child under 17 years of age found within the county

"(1) Whose parent or other person legally responsible for the care and maintenance of such child, when able to do so, neglects or refuses to provide proper or necessary support, education as required by law, medical, surgical or other care necessary for his health, morals, or who is deprived of emotional well-being, or who is abandoned by his parents, guardian or other custodian, or who is otherwise without proper custody or guardianship; or

"(2) Whose home or environment, by reason of neglect, cruelty, drunkenness, criminality or depravity on the part of a parent, guardian or other custodian, is an unfit place for such child to live in, or whose mother is unmarried and without adequate provision for care and support."

The statement that "the court finds the material allegations contained in the petition have been substantiated" is certainly general, conclusory and unhelpful, if not vague and inadequate, even allowing for the pressure of case load on the probate court. To begin with, there are at least several different and even conflicting allegations in the petitions, and § 2(b), subds (1) and (2) also contain several different provisions. The reader of the opinion and order is thus left without adequate clue as to which allegations were material and which one or more of the statutory provisions are pertinent.

For example, the original petition alleged "that the known relatives are unable or unwilling to care for the child". The subsequent petition alleged that "Michelle Thomas * * * is unsuitable" as a custodian. Certainly these two allegations are in direct conflict. When the probate court opinion "finds that the material allegations contained in the petition have been substantiated", it is not possible to know for sure whether one or the other or both allegations were "substantiated".

Because of such problems, when the matter came to this Court's attention on appeal, we ordered that there be an explication of the probate court's opinion.

The probate court then made further findings of fact in response to this order. The pertinent portions thereof are:

"9. Deborah F__ gave birth to Taurus on March 17, 1978, while serving her sentence at Huron Valley Women's Correctional Facility. Tr. at 15.

"10. At the time of trial, Deborah F__'s earliest release date would occur on March 23, 1985, 6 years and 8 months from the date of trial.

"11. Inmates are not permitted to have physical custody of their child while incarcerated. Tr. at 13.

"Therefore, Deborah F__ could not provide proper care for Taurus at the time of trial.

"12. Michelle Thomas, sister of Deborah, was willing to provide care for Taurus, but only under the conditions that the placement be permanent and that she be given authority to decide when and if Deborah was capable of regaining custody. Tr. at 95.

"13. There was no evidence presented at trial that Deborah F__ agreed to Ms. Thomas' conditions.

"Therefore, because her requirement for conditions could not be guaranteed by the court, Michelle Thomas was not available to provide temporary foster care for her niece.

* * *

"19. No other relative was found who was willing to care for Taurus."

The probate court in its explication did not substantiate its reference to § 2(b)(2). It relied on the "proper custody" provision of § 1 in establishing jurisdiction.

On the one hand, these findings clearly establish that the mother, Deborah, was unavailable to provide "proper custody". She was shown to be incarcerated for 6 years and 8 months and there exists a rule against custody of children while incarcerated.

On the other hand, findings 12 and 13 concerning availability of care by relatives raise a number of questions. Was the sister unavailable to have custody

(1) because she was a sister? or

(2) because she demanded permanent or conditionally permanent custody? or

(3) because there was no evidence that the mother agreed to the sister's conditions? or

(4) because, reading together the probate court's first opinion and the second petition, the sister is an unsuitable custodian because "she is in the process of obtaining a divorce" etc., i.e., not suitable to adopt the child?

Pages mismumbered in original copy.

Before we address each of these four questions seriatim, let us briefly consider two statements made in the further findings of fact. The first statement is, "because her requirement for conditions could not be guaranteed by the court". The relevance of this to whether or not the custody is proper is not perceived. If the mother was willing to give custody, and the sister willing to receive custody, under these conditions, and the custody was otherwise "proper", it is not apparent what difference it makes whether or not the judge can guarantee the conditions. The second statement is, "Michelle Thomas was not available to provide temporary foster care for her niece" (emphasis supplied). This observation is not at issue. The issue is not whether the sister was "available to provide temporary foster care", the issue is whether permanent custody is "proper custody". For the reasons stated, we give no further consideration to these statements.

III. CAN A SISTER PROVIDE "PROPER CUSTODY"? (QUESTION 1)

Actually, the point we will consider is more fundamental than "can a sister provide proper custody". The point we will consider is whether a mother can without court intervention give custody of her child to her sister, and whether that custody, if otherwise "proper", creates "proper custody". We hold that the answer to this double-barreled question is yes. Yes, if a mother gives custody to a sister, that can be "proper custody". Yes, a mother can give custody of her child to her sister without court intervention.

While there is no direct Supreme Court precedent for this question, there is helpful analysis by Justice Levin. There are also two opinions of the Court of Appeals directly on point. Justice Levin's observation provides the seminal rationale. In his opinion in In re Maria S Weldon, 397 Mich 225, 296; 244 NW2d 827 (1976), he said:

"Most parents raise their children themselves. Some parents, however, because of illness, incarceration, employment or other reason, entrust the care of their children for extended periods of time to others. This they may do without interference by the state as long as the child is adequately cared for. 'Clearly it is not the law that before a child can be placed by a

parent in temporary custody of a relative permission must be first obtained from the court.' Diernfeld v People, 137 Colo 238, 242-243; 323 P2d 628, 631 (1958) (emphasis by the Court)."

More recently two Court of Appeals cases have specifically considered the "otherwise without proper custody" provision of MCL 712A.2; MSA 27.3178(598.2) where the parents had entrusted a child to relatives without court intervention. These cases relied in large part upon Justice Levin's observations and concluded that where a child has been given into otherwise proper custody of a relative the child is not "otherwise without proper custody" and the probate court cannot establish jurisdiction. In the Matter of Carlene Ward, 104 Mich App 354, 357-360; 304 NW2d 844 (1981) (a sister); In the Matter of Curry, 113 Mich App 821, 822-826; 318 NW2d 567 (1982) (maternal and paternal grandmothers). We agree with the reasoning and conclusions in both cases. The latter one, as the instant case, involved incarcerated parents.

It is well to review thoughtfully the twice-approved language of Justice Levin in In re Maria S Weldon, p 296. He said:

> "Some parents * * * because of illness, incarceration, employment or other reason, entrust the care of their children for extended periods of time to others. This they may do without interference by the state as long as the child is adequately cared for."

For our purposes, the importance of this statement is threefold. First, the parent can place the child "without interference by the state as along as the child is adequately cared for". Second, with respect to Part IV of this opinion, Justice Levin's statement establishes "proper custody" as custody where "the child is adequately cared for" rather than on a time basis. Third, the statement contemplates custody "for extended periods of time".

Incidentally, our conclusion as to the "properness" of a sister's custody is corroborated by the interpretation put on the statute by the state agency administering it. Such interpretation, of course, is always entitled to respectful consideration. Ford Motor Co v State Tax Comm'n, 400 Mich 499, 522; 255 NW2d 608

(1977). The Department of Social Services Manual, Item D-220(2), reads:

"When a child cannot return to his own parents, placement with relatives is to be considered."

In the instant case, after the department learned of the approaching birth of a child to a mother incarcerated for a period of years, they sought out relatives for placement. (Testimony of P. Theifels, DSS employee, 28a)

Because of these reasons, we hold that a mother's placement of a child with a sister can be a "proper custody" without court intervention.

IV. CAN THERE BE PROPER CUSTODY WHERE A SISTER CONDITIONS HER AVAILABILITY ON (1) HAVING A PERMANENT PLACEMENT AND (2) HAVING AUTHORITY TO DECIDE WHEN AND IF THE MOTHER SHALL REGAIN CUSTODY OF HER CHILD? (QUESTION 2)

If the mother gives her sister permanent custody and authority to return or not return her child, is that proper custody?[12] This is the question we now consider.

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12. The following evidence on the record is illustrative of the conflicting testimony presented at trial which led the probate court to conclude that Ms. Thomas would only accept custody of Taurus with certain conditions. The following answers were given by Michelle Thomas in response to direct examination by Ms. Kathryn Sedo, attorney for Mrs. Finney.

> "Q. Did you ever tell anyone that you would not take care of Taurus unless you could adopt her?
>
> "A. No, not really. It was the way it was put. The way the discussion went; that's the way, you know, she boiled it down to that I wouldn't take her unless I could legally adopt. But, like I told her and I am telling you now, I am willing to take the child and have legal guardianship of her, but I would have the say in the matter as far as the mother and father is concerned. They couldn't just walk out of prison and take her, you know, without proving to me that, you know, first they were able to handle a child.
>
> * * *
>
> "Q. Did you ever state to the foster care worker that the reason you wanted -- the reasons for wanting a -- what you call a permanent custody referring to the -- (inaudible) West who came to visit you first, to visit your home, the foster care worker, did you ever tell her that you wanted some type of custody arrangement where you could have the child permanently and that Deborah could not come and take the child from you?
>
> "A. I just said -- okay. Let me say this again. I would take the child, have legal guardianship; the parents could come and get the child on the weekends, take her, you know, for the weekend, what have you; when they can prove to

12. (Footnote continued)

the court and to me that they are able to take the child then they can take the child.

"Q. I see. Did you make any statements to the foster care worker about your sister's activities or your feelings toward your sister?

"A. What? What kind of statements?

"Q. About how you felt -- did you ever -- did you ever tell the foster care worker that you felt that Deborah --

"A. I told the worker that I felt that at, if this position, if my sister did get out, that she would not be capable of taking a child and that she would have to prove to me that she was able to take care of a child. Meaning staying off of drugs, quit hanging with her friends, getting her a nice job, getting her a nice place to stay, and then she could have her children back.

* * *

"Ms. Thomas: I am saying, after you decide that he is capable of taking the child and things don't work out on him keeping the child, her living standards aren't right, things, you know, things fall apart for him on his job, and what have you, then where does the child go back to the state or back to me?

"Judge: That's something we will have -- I can't -- no decision can be made according to the status of the child right now. We would have to decide that at a later time. Does that make a difference to you whether you are going to take the child or not?

"Ms. Thomas: Not really, but, I mean, I look at it this way. There is no need for the child to be pulled back and forth when it is not necessary, when she can just stay with me, and he can have visitation rights."

The following paragraph of a letter was read into evidence by Mr. Paul Thiefels, caseworker, Department of Social Services:

"A. Okay. It says 'Michelle has discussed the new baby with her sister and has made her feelings very clear. Michelle is willing to take care of the baby and raise it. The only condition is that the baby is legally hers, and Deborah cannot come back after her incarceration and try to take the baby. It would not be fair to the child, and the foster care worker agrees with this. Since Michelle has taken care of Aleka since birth and is trying to obtain custody, she does not want to hassle with this again. The worker feels it is very realistic of Michelle to feel this way. She does not want to raise two children with no permanent rights, and have Deborah be able to take her away whenever she wants. She did say that Deborah could visit the baby whenever she wanted, and she would tell the child that Deborah was -- was her mother, but Michelle must have permanent custody of this child.'"

Martin Cowens, the natural father, also testified as to Ms. Thomas' desire to have permanent custody.

"Q. Did you ever ask any of Deborah's relatives to take care of -- take care of Taurus Finney?

"A. I talked to Michelle.

"Q. Excuse me.

"A. I said I have talked to Michelle Thomas.

"Q. What did you -- what did you tell her in this conversation that you have had with her?

"A. Well, she told me that she would take care of Taurus until I was able -- she would -- she would take care of Taurus only if she could adopt her. This is what she told me the second time. I talked with her on two occasions. The second time she said she wanted to [illegible]

We have been presented with no case or textbook authority, nor have we found any, answering the question posed. We must therefore analyze the statutory provisions to determine what the Legislature intended. As a consequence, for convenience and review we again quote the pertinent part of § 2(b):

"Sec. 2. Except as provided herein, the juvenile division of the probate court shall have:

* * *

"(b) Jurisdiction in proceedings concerning any child under 17 years of age found within the county

"(1) Whose parent or other person legally responsible for the care and maintenance of such child, when able to do so, neglects or refuses to provide proper or necessary support, education as required by law, medical, surgical or other care necessary for his health, morals, or who is deprived of emotional well-being, or who is abandoned by his parents, guardian or other custodian, or who is otherwise without proper custody or guardianship; or

"(2) Whose home or environment, by reason of neglect, cruelty, drunkenness, criminality or depravity on the part of a parent, guardian or other custodian, is an unfit place for such child to live in, or whose mother is unmarried and without adequate provision for care and support."

In analyzing this text, the first conclusion must be that there is no time limitation specified in the phrase "otherwise without proper custody" or anywhere in § 2(b). The second conclusion must be that the Legislature has given a clear indication of what it considers "proper custody" by spelling out improper custody in terms of failing to provide what it considers proper custody.

For example, § 2(b)(1) begins by providing that the court may have jurisdiction where the "parent or other legally responsible person * * * neglects or refuses to provide proper or necessary support, education * * * care necessary for his health, morals, or * * * well-being". In other words, such neglect or refusal is improper custody warranting the court's taking jurisdiction. But presumably the provision of such support, education, and care would characterize "proper custody". Likewise, the opposite of the abandonment (in § 2[b][1]) of a child or providing an unfit home for a child because of "neglect, cruelty, drunkenness, criminality or depravity" (in § 2[b][2]) would characterize "proper custody".

The rule of noscitur a sociis, viz., kown by its associates, indicates that the catch-all phrase "otherwise without proper custody" must mean custody which is generally of the same category as the other improper custody described in § 2(b), subds (1) and (2), but not the same as any of them.

When we construe "otherwise without proper custody" then, it must be something other than without necessary support, education, and care necessary for health, morals, and well-being or in a home marked by cruelty, drunkenness, criminality, or depravity, but nonetheless something within the same general category. Does the fact that custody is temporary or permanent fall within such a category? We think not.

The definition of § 2(b), subds (1) and (2) obviously relates to something which clearly creates an environment hostile to the best interests and well-being of the child. Custody, either temporary or permanent, is not per se hostile to the well-being of a child. Whether a temporary or a permanent custody may be proper or improper for a child in a given case is dependent upon factors outside the time span per se.

Furthermore, since the juvenile chapter of the Probate Code provides for both temporary and permanent custody, it is clear that the Legislature considered both temporary and permanent custody to be proper custody according to the other conditions of the matter. See § 20. As a consequence, we must conclude that custody is not per se improper because it is temporary or permanent.

We are further confirmed in our belief that the brevity or length of the custody is not per se critical to the properness of custody by the implications of § 1, which in pertinent part reads:

"This chapter shall be liberally construed to the end that each child coming within the jurisdiction of the court shall receive such care, guidance and control, preferably in his own home, as will be conducive to the child's welfare and the best interest of the state and that when such child is removed from the control of his parents the court shall secure for him care as nearly as possible equivalent to the care which should have been given to him by them."

This provision emphasizes that statutory construction shall be such as to best achieve the child's care in his own home. It would certainly seem that the best care would be permanent home care, and the next best care would be surrogate family home care. If the mother and her sister agree on permanent home care in the sister's home, certainly that, in the legislative priorities, would seem preferable to temporary or permanent care elsewhere.

Our analysis of the Legislature's intention after reviewing all the language of § 2(b) and other sections of the juvenile statute is that "proper custody" relates to the appropriateness of the care given the child and the character of the home rather than whether the custody is short or long. This, we believe, not only correctly determines what the Legislature had in mind, but makes eminent good sense. What is important is whether the child receives proper care. If the parent who is about to give up custody is suffering from some temporary inability to provide proper care, then it would seem to be in the child's best interest as well as that of the parent that the custody also be temporary so that child and parent can be reunited within a reasonable time and preserve the family relationship and the child's best interest. However, if the parent is suffering not a temporary, but a long or permanent disability, then it is probably in the child's best interest that the separation from the parent and the custody be permanent.

We would conclude therefore that a permanent placement with a sister would not per se be an improper custody. Likewise, we would conclude that a placement conditioned upon the sister having the right to decide when and if the mother should have the return of her child if the mother agrees to it is not per se improper custody.[13]

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13. Let us examine some hypothetical possibilities of a parent granting permanent custody to a relative. First, let us consider that the sole remaining parent is aged, wanting to give permanent custody to a brother or sister. It is hard to say that is not proper custody. Second, consider the parent who has ten children, and whose brother or sister has none and is most anxious to have a child. There certainly is nothing immoral or against public policy in giving such custody. Furthermore, if custody is given, it is logical that the custody be permanent, otherwise the child may suffer trauma by having to establish ties and then having

V. NO EVIDENCE THAT THE MOTHER AGREED TO THE AUNT'S CONDITIONS (QUESTION 3)

The probate court on remand for explication found:

"13. There was no evidence presented at trial that Deborah F__ agreed to Ms. Thomas' conditions."

We must determine the legal significance of this finding.

Section 2(b) provides that the probate court shall have jurisdiction of a child who is "otherwise without proper custody". Lack of "proper custody" is therefore jurisdictional. The state must therefore establish jurisdiction by affirmatively proving that the child is "otherwise without proper custody".

Assuming that the finding "there was no evidence presented" is factually correct, that finding is, for two reasons legally insufficient to establish lack of proper custody and therefore jurisdiction in the probate court. First, it is the state's obligation in order to obtain jurisdiction in the court to prove that the child is "otherwise without proper custody", and, as long as it is not known whether or not the mother consents to the conditions of her sister's custody, the state has not satisfied its burden of proof that proper custody is not available.

Second, assuming that no evidence has been presented pro or con, then the state is confronted by the its second petition which reads "the mother claims one relative, Michelle Thomas, her sister, is willing as of the moment to take custody of the child". This pleading reasonably indicates that the mother does approve of that custody, or she would not "claim * * * the sister is willing * * * to take custody". In any event, the state's petition took the claim seriously enough to deal with it by saying that the sister's custody would be unsuitable. In sum, the state's own pleading created an inference that the mother

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13. (Footnote continued)

Third, consider the parent who is unable because of health, poverty, or other reason to care for all or any of the parent's children, but who has a brother or sister fully able and anxious in every way to care for the child or children; is it immoral or against public policy for that parent to give permanent custody to the relative? We think not.

agreed to custody. Consequently agreement might be assumed without proof to the contrary. As the court found no proof to the contrary, the inference of agreement remains.

In conclusion, this Court holds that the probate court's finding that "[t]here was no evidence presented at trial that Deborah F__ agreed to Ms. Thomas' conditions" is legally insufficient to satisfy the sate's obligation to prove that the child was "otherwise without proper custody".

VI. DOES THE PROOF OF ADOPTION UNSUITABILITY ESTABLISH "OTHERWISE WITHOUT PROPER CUSTODY"? (QUESTION 4)

Before considering the question "Does the proof of adoption unsuitability establish 'otherwise without proper custody?'", it is essential to put this question into context with the general development of this case, or the question might seem somewhat irrelevant. The development of this case contains points of confusion and unexpectedness, because of a number of factors, including the apparent lack of appreciation by the probate judge of the parental right to place a child in the custody of another member of the family without the intervention of the court, the indecisive and perplexing action of the mother and sister in transferring custody of Taurus, the quick and ambiguous taking of custody of the child by the probate court, and the subsequent apparent assumption of that court that its duty was the proper placement of the child, although it had not established jurisdiction.

This case is confused first because the mother, Deborah Finney, and her sister, Michelle Thomas, seemed to have had difficulty in agreeing on the exact conditions of the transfer of Deborah's child Taurus to Michelle. This prevented a speedy transfer between the sisters without court intervention before the probate court took custody of the child. We, of course, held that this transfer was their right in answering question 2. The indecisiveness of the attempted intrafamily transfer seemed to bother the probate court in determining whether it could "grant"

custody to Michelle under the conditions the court believed she required. The probate court apparently never contemplated that the parent had the right to transfer custody to her sister without court intervention.

The combination of the failure of the sisters to effectuate a prompt transfer of custody and the speedy, although ambiguous, taking of custody by the court created a new confusion. Physically the sisters were no longer able to exercise their right of transfer, and the probate court failed to understand that its first duty was to establish jurisdiction by determining that Taurus was otherwise without proper custody rather than to attempt to determine whether placement with Michelle was proper, either for temporary foster care or adoption. After all, such an inquiry would seem somewhat anomalous as Michelle had had custody of another child of Deborah's for several years.

The nature of the probate court's confusion is illustrated in the following quotation from its findings of fact and explication of the court (p 6):

> "Ms. Thomas was willing to say that she would take the child without adoption. Nevertheless, * * * she still expected a level of control and permanence which was inconsistent with foster care and which the court could not guarantee by any order other than adoption."

To begin with, the real question should have been, "Ms. Thomas, have you and your sister agreed on the transfer of the child?" If they had agreed, then any further question would be superfluous because of the mother's right to give her sister custody unless the probate court was prepared to find that custody in Ms. Thomas' home was not proper under § 2(b). If that were the case, by the same logic they would have to review the possibility of removal of the three children already in Ms. Thomas' home, her own two and Taurus' sister Aleka. The judge, apparently not appreciating the right of intrafamily transfer of custody, was trying to be helpful according to the law as he understood it. On the one hand, he considered temporary foster care, but erroneously concluded Michelle's "permanent custody" condition precluded any custody except possibly adoption. The

court later considered the adoption alternative, and "the court was of the opinion that * * * it would not be appropriate to place * * * a four-month-old baby in the Thomas home". Findings of Fact and Explication of the Court, September 3, 1982, pp 7-8. While kindly meant, neither the foster care inquiry nor the adoption inquiry, i.e., did Michelle qualify as a foster parent or as an adoptive parent, were pertinent, for two main reasons: The first reason is that Michelle was not a candidate for foster or adoptive parenthood. The second reason is that the court's first task was to establish its jurisdiction under § 2(b), by determining whether the child was "otherwise without proper care", not to look for foster care or adoptive parents. This Court regrets that the unfortunate language of its order directing "findings of fact concerning the propriety of a possible temporary * * * or permanent placement with the child's aunt" may have misled the probate court into this erroneous analysis. This Court was considering "placement" by the mother and "propriety" in relation to "proper care" under § 2(b). See fn 7.

This brings us to consideration of the question, "Does the proof of unsuitability for adoption establish 'otherwise without proper custody?'" As we have already indicated, in this case the probate court has, aside from this question, not established jurisdiction and, as a consequence, is not in a position to establish suitability or unsuitability for adoption, or anything else. However, looking beyond whether the question of adoptability could have been considered, it is possible to consider the issue whether a criterion to establish "otherwise without proper custody" could be whether the custodian was unsuitable for adoption.

So addressing ourselves to the question whether unsuitability for adoption can be a criterion to establish "otherwise without proper custody", we find that there are two reasons "otherwise without proper custody" does not contemplate the test of unsuitability for adoption.

First, it is not possible to believe that the Legislature would have intended the catch-all phrase "otherwise without proper custody" to include so important and well-articulated a concept as adoption without specifically saying so.

Second, the criteria of § 2(b), child removal, and MCL 710.46; MSA 27.3178(555.46), child adoption, are completely different. Section 2(b) sets criteria for parents who fall so far below the level of proper care that they must be relieved of the custody of their children. On the other hand, MCL 710.46; MSA 27.3178(555.46) prescribes a triple-headed child adoption criterion relating first to the suitability of the child for adoption, second to the suitability of the parent for adoption, and third to the suitability of the two to each other. Among the factors establishing the suitability of the potential adoptive parent is the "respective racial, religious and cultural backgrounds" of the child and the potential adoptive parent. In short, MCL 712A.2(b); MSA 27.3178(598.2)(b) and MCL 710.46; MSA 27.3178(555.46) have totally different objectives. A parent could avoid loss of a child under MCL 712A.2(b); MSA 27.3178(598.2)(b) criteria, but still not be suitable as an adoptive parent for a particular child under MCL 710.46; MSA 27.3178(555.46).

In view of these considerations, we hold that unsuitability for adoption is not a relevant criterion to establish "otherwise without proper custody".

VII. CONCLUSION

We hold that the probate court acted improperly in terminating the parental rights of Deborah Finney because the department failed to establish jurisdiction in the probate court under the "otherwise without proper custody" criterion by showing affirmatively that Deborah and Michelle had failed to agree on a custody arrangement or that for purposes of MCL 712A.2(b); MSA 27.3178-(598.2)(b) Michelle was an improper custodian.

If the mother and aunt can agree on the aunt taking custody of Taurus, and if the Department of Social Services does not disqualify the aunt under MCL 712A.2(b); MSA 27.3178(598.2)(b)

(the department has not done so so far), then there would appear to be no reason why the question of Taurus' custody could not be speedily resolved by allowing Deborah to provide custody for Taurus through Michelle Thomas.

The situation becomes more complicated, however, if the mother, now released from prison, seeks custody for herself. First of all, the aunt can no longer supply the proper custody and thereby avoid probate court jurisdiction on that ground. The question then becomes whether the probate court has jurisdiction under § 2(b), subds (1) and (2) based on the mother's present possible disqualification for custody. The conclusory order and opinion of the probate court of August 24, 1978, stated "[t]he Court finds that the material allegations contained in the petition have been substantiated and further finds that the said child is within the jurisdiction of the court on the basis of § 2(b), subds (1) and (2)" (emphasis added), which was conclusorily affirmed by the circuit court. When asked to explicate its order, the probate court referred to "proper custody", presumably referring only to subsection (1) of § 2(b). The explication emphasized that the child was alleged to be "otherwise without proper custody" because her mother was incarcerated. Now that the mother is no longer in prison and disqualified from custody under subsection (1), and the probate court has seemingly retreated from subsection (2), it is necessary to have the Department of Social Services and the probate court evaluate the present situation if the mother seeks custody in herself rather than in the child's aunt.

Fairness to all, especially considering that Taurus has been in foster care for four years, would dictate an effort to expedite the matter toward a final resolution of custody. As indicated, if the mother and aunt can agree on conditions of the aunt taking custody, the matter, it is hoped, could be quickly resolved by the following order: the Department of Social Services shall show cause in writing before the probate court within 20 days of the date of this opinion why the child Taurus

should not be transferred to the custody of her aunt, Michelle Thomas. The mother, Deborah Finney, and the guardian ad litem shall have 15 days from the filing of the department's writing to respond. Thereafter the probate court shall make its determination and issue its order within 15 days after the last filing has been made.

If the probate court finds that the Department of Social Services has not shown cause why custody of the child Taurus should not be transferred to the aunt, Michelle Thomas, then the probate court shall order the appropriate transfer.

As indicated above, if the mother seeks custody, the matter is more complicated. However, every effort should be made to reach an early resolution. The department, if it wishes to further pursue this matter, shall file its petition within 20 days. The mother and guardian ad litem shall have 15 days from the filing of the department's petition to respond. The probate court shall, if a hearing is required, set it at the earliest possible date, not later than 30 days. Thereafter the probate court shall proceed with expedition and render its opinion and order within 120 days of the filing of the department's petition.

This Court retains jurisdiction.

Thomas Giles Kavanagh

3/October 1981

STATE OF MICHIGAN

SUPREME COURT

IN THE MATTER OF TAURUS F.,

DEBORAH FINNEY;

Respondent-Appellant, No. 65140

MICHIGAN DEPARTMENT OF SOCIAL SERVICES,

Petitioner-Appellee.

BEFORE THE ENTIRE BENCH (except Riley, J.).
M. S. COLEMAN, J.

Nearly five years after her birth to an inmate of Huron Valley Correctional Facility, Taurus Finney remains in a foster home while lawyers debate and courts consider and reconsider her fate. It is argued that the probate court had no jurisdiction ab initio and that all subsequent proceedings are a nullity. If the court had no such jurisdiction, as found by Justice Williams, we would have to agree with appellant that this Court also would have no authority by which to make orders concerning the child Taurus. Custody would revert to the mother, Deborah Finney (neither the putative father nor James Finney has appealed the termination). An entirely new process likely would commence, dependent upon the current situation of the mother.

Therefore, it is critical that we first determine whether the child is properly within the jurisdiction of the probate court. We are bound by the record at the adjudication hearing. If jurisdiction is established, the court proceeds according to JCR 8 to the "dispositional phase" during which determination is made as to whether the court will order temporary or permanent custody. MCL 712A.20; MSA 27.3178(598.20). If permanent custody is ordered, the child usually is placed or continued in foster (including relative) care until adoption procedure is in place. "A child shall not be placed in a home for the purpose of adoption until an order terminating parental rights has been

entered", but that provision "shall not be construed to prevent a child placed in a licensed foster home from being adopted by the foster parent or parents". MCL 710.41; MSA 27.3178(555.41).

We would affirm the termination of parental rights on this record.

I

The facts of this case are in dispute, but the record supports at least some basic determinations.

Taurus Finney was born on March 17, 1978, to Deborah Finney, who had been convicted of several felonies on separate dates: (1) carrying a concealed weapon, (2) attempted possession of heroin, and (3) delivery of heroin. She was imprisoned in Huron Valley Correctional Facility. Her first "out date" was said to be March 23, 1985, or possibly June, 1983. Deborah Finney had been incarcerated since October of 1976, but escaped briefly. During that time Deborah had intercourse with one Martin Cowens, also a prisoner convicted of possession of heroin, who was in minimum security. Taurus was born of this union. Mrs. Finney was married to James Finney, whose whereabouts are unknown.

Deborah Finney had two other children, Alayho, born June 22, 1968, and cared for by his maternal great-grandmother, and Aleka, born April 14, 1976, addicted to heroin or methadone, as was Mrs. Finney at the time. Aleka has been cared for by Mrs. Finney's sister, Michelle Thomas, since birth. She has legal guardianship over that child.

It appears that the Department of Social Services tried to help the mother plan for Taurus. Commencing when appellant was 7-1/2 months pregnant, social workers met weekly with the expectant mother and visited with relatives, including Michelle Thomas, a sister, in an attempt to find someone willing to care for the baby. At first, this sister said she was unable to care for the child. Later, she said she would be willing to take the baby if the arrangements

were permanent. Mrs. Finney would not agree to adoption. No petition has been filed in the probate division seeking legal guardianship, and nothing further has been suggested or done by the mother to effectuate such a plan.

The probate judge terminated Mrs. Finney's rights after a hearing on July 31, 1978. Mrs. Finney appealed to the Washtenaw Circuit Court, which affirmed the determination of the probate court in a decision signed October 26, 1979. Taurus remained in the custody of the foster family with whom she initially was placed. Now, nearly five years later, Taurus apparently still is with this same foster family, who have expressed an interest in adopting her.

On April 23, 1980, the Court of Appeals denied Deborah Finney's application for leave to appeal. A delayed application for leave to appeal was filed in this Court and on October 3, 1980, the matter was remanded for an evidentiary hearing primarily concerning the present status of the appellant, her sister, her husband, Taurus and the putative father and placement alternatives then available. The probate judge could make a recommendation as to placement.

He did so after a hearing in January, 1981, and stated that "[i]t is the court's unqualified recommendation that Taurus should remain in the foster home and that adoption should be pursued".

Nevertheless, leave was granted and oral arguments heard (October 13, 1981). On July 7, 1982, this Court again remanded to the probate court for clarification and for findings of fact concerning possible placement with the aunt.

Again, we received findings of fact and explication of the court on September 7, 1982, with an amendment two days later.

II

At the outset, there is no argument as to the legality of a mother's placement of a child with a relative prior to

court intervention. However, that is not this case. The mother was in prison and no relative was available to take the child. The conditions of the sister for a permanent arrangement were not met.

The statute with which we are concerned provides:

"Except as provided herein, the juvenile division of the probate court shall have:

* * *

"(b) jurisdiction in proceedings concerning any child under 17 years of age found within the county

"(1) Whose parent or other person legally responsible for the care and maintenance of such child, when able to do so, neglects or refuses to provide proper or necessary support, education as required by law, medical, surgical or other care necessary for his health, morals, or who is deprived of emotional well-being, or who is abandoned by his parents, guardian or other custodian, or who is otherwise without proper custody or guardianship; or

"(2) Whose home or environment, by reason of neglect, cruelty, drunkenness, criminality or depravity on the part of a parent, guardian or other custodian, is an unfit place for such child to live in, or whose mother is unmarried and without adequate provision for care and support." MCL 712A.2; MSA 27.3178(598.2). (Emphasis added.)

In this case, there was no disputing that Mrs. Finney could not herself provide proper custody for her daughter. The only question is whether there existed proper custody with her sister such as to deprive the probate court of jurisdiction.

Under the "otherwise without proper custody" provision of MCL 712A.2(b)(1); MSA 27.3178(598.2)(b)(1), we conclude that the state makes a prima facie case that the child is "otherwise without proper custody" when it shows that the parents or persons in actual custody are not providing proper custody. Given such a showing, the burden shifts to a parent to introduce evidence that other arrangements to provide proper custody have been made. The parent's argument that her sister, Michelle Thomas, would provide adequate care for the child was in the nature of an affirmative defense. Placing the burden on the parent who asserts such an agreement avoids placing the Michigan Department of Social Services in the impossible position of having to show that such agreements do not exist, given the

fact that any number of such possible alternative arrangements might be asserted.

In this case, the probate judge found no evidence that Mrs. Finney and her sister had reached an agreement for the sister to take custody. This finding is supported by the evidence. Therefore I cannot agree with my brother's factual finding that an "inference" of an agreement was created. Absent a showing of an actual agreeement, the probate court was justified in concluding that Taurus was without proper custody, and that the court had jurisdiction.

With reference to the disposition, evidence of the mother's extensive incarceration for felonies involving crimes reflecting lack of fitness as a parent and of her long history of instability, addiction and criminality compels a conclusion supporting termination of parental rights. Mrs. Finney had not accepted responsibility for her other two children and there was no evidence that the pattern of her life would change. The child has not had the advantage of "bonding" with a parent excepting the psychological "bonding" with the foster parents of nearly five years. The party most affected by this matter is the child Taurus herself who is in danger of being severely hurt by the excessive duration of litigation leading to a permanent home.

Although there are other points in which we disagree with our colleague, our conclusion on this crucial issue is dispositive.

We affirm.

Mary A. Coleman

John D. Fitzgerald

Jean L. Gott

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 18th day of February in the year of our Lord one thousand nine hundred and eighty-three.

FEB 23 1983

Present the Honorable

G. MENNEN WILLIAMS,
Chief Justice
THOMAS GILES KAVANAGH,
CHARLES L. LEVIN,
JAMES L. RYAN,
JAMES H. BRICKLEY,
MICHAEL F. CAVANAGH,
Associate Justices.

Rehearing No. 80

IN THE MATTER OF TAURUS F.,
a minor,

DEBORAH FINNEY,

Respondent-Appellant,

v

MICHIGAN DEPARTMENT OF SOCIAL SERVICES,

Petitioner-Appellee.

SC: 65140
CoA: 49862
LC: 78-15722-AV

In this cause, a motion for rehearing is considered and, on order of the Court, it is hereby DENIED.

Cavanagh, J., would grant rehearing.

STATE OF MICHIGAN — ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 22nd day of February in the year of our Lord one thousand nine hundred and eighty three

Clerk.

STATE OF MICHIGAN

IN THE PROBATE COURT FOR THE COUNTY OF WASHTENAW

JUVENILE DIVISION

IN THE MATTER OF

TAURUS F_____,

Minor

OPINION
and
ORDER

The mother of the above-named minor was convicted of delivery of heroin and possession of dangerous weapons. She is incarcerated in the Huron Valley Women's Facility and will be so incarcerated until at least 1985. During the period of her sentence the mother escaped from the correctional institution and the above-named minor was conceived by Martin Cowans, aka Thaddeus Russell. The above-named putative father has been convicted of possession of heroin and will not be released from minimum security until 1979. Testimony indicated that James Crawford Finney, husband of Debra Finney, and legal father of Taurus F_____ has been absent and whereabouts unknown for several years.

The Department of Social Services, Protective Services, by their worker Paul Thiefels, filed a petition requesting termination of parental rights. The child was born on March 17, 1978 at the Huron Valley Correctional Facility, located in Washtenaw County.

On April 3, 1978, after a hearing before the referee, Robert M. Barrie, the court found that the conditions and surroundings under which the child was found are such as to endanger her health, morals or welfare, in that a prison for adults is not an appropriate place for the care and nurture of an infant and the child was ordered placed in foster care under the supervision of the Department of Social Services.

41A SDSS

On July 31, 1978, a hearing was held and testimony taken concerning the neglect petition filed by the State Department of Social Services. The Court finds the material allegations contained in the petition have been substantiated and further finds the said child is within the jurisdiction of the court based on Section 712A.2 Sec.(b) Subsection (1) and (2).

DISPOSITION

The Court finds that both natural mother and putative father are convicted of felonies of a nature to prove their unfitness to have the future custody of the child and both are imprisoned for a period and the child will be derived of a normal home for a period of more than two years. The mother will not be released from prison until 1985 and the father might be released in 1979, but it is the opinion of the Court that given their propensities to crime, their past convictions, their unmarried state, that if the child were placed with them,she would be deprived of a normal home for a period of more than two years.

IT IS THEREFORE ORDERED that all parental rights of Debra Finney, aka Michelle Hooks; Martin Cowans, aka Thaddeus Russell; and James Crawford Finney, are hereby terminated.

Francis L. O'Brien

FRANCIS L. O'BRIEN
Probate Judge
Juvenile Division

Dated: Aug. 24 1978

cc: attorney for mother
attorney for putative father
SDSS
Adoption worker
Neglect worker
GAL

FILED

AUG 24 1978

JUVENILE REGISTER

42A

State of Michigan,

The Probate Court for the County of WASHTENAW

In the Matter of the TAURUS FINNEY

At a session of said Court, held on the 24th day of August A. D. 19 78

Present, Hon. FRANCIS L. O'BRIEN, Judge of Probate.

This cause came on to be heard upon Petition #78-136 and amended petition #78-136 signed by Paul Thiefels, alleging that the above-named child comes within the provisions of Act No. 54, Public Acts of Michigan 1944, First Extra Session as amended; and requesting that the parental rights of Deborah Finney, aka Michelle Hooks, mother; and Martin Cowens, aka Thaddeus Russell, natural father; and James Crawford Finney, legal father, be terminated; and

A summons having been personally served upon Deborah Finney, aka Michelle Hooks, mother of the above-named minor, and said party having appeared for the said hearing; and

A notice of hearing to identify father and determine or terminate his rights having been sent by certified mail to Martin Cowens, aka Thaddeus Russell, natural father, and said party having appeared for the said hearing; and

The court having entered an Order of Publication for the hearing of said petition, the address and whereabouts of the said James Crawford Finney, legal father of the above-named minor, being unknown and the said Order of Publication having appeared in the Ann Arbor News on May 12, 1978, and the said James Crawford Finney not having appeared at the said hearing; and

It appearing to the court that it would be for the best interests of the said child to be placed under the permanent custody of the court, continued in licensed foster home care, under the supervision of the Washtenaw County Department of Social Services, for the purpose of adoption, and until further order of the Court;

IT IS NOW THEREFORE ORDERED that TAURUS FINNEY be and she is placed under permanent custody of the court, continued in licensed foster home care, under the supervision of the Washtenaw County Department of Social Services, for the purpose of adoption, and until further order of the court;

IT IS FURTHER ORDERED that all parental rights of the mother, Deborah Finney, aka Michelle Hooks; the natural father, Martin Cowens, aka Thaddeus Russell; and the legal father, James Crawford Finney, be and they are hereby terminated.

The Court herewith advises the parents that they have a right to appeal the order of termination to the Circuit Court and if they

are indigent the Court will appoint counsel at public expense to represent them and will supply transcripts of the proceedings, a request for counsel may be made informally and shall be deemed timely if made orally or in writing not later than 20 days after the entry of the order of termination (396 Mich 326).

Francis L. O'Brien

FRANCIS L. O'BRIEN
Probate Judge
Juvenile Division

cc: mother (certified mail)
natural father (certified mail)
legal father (certified mail)
counsel
SDSS
neglect worker
adoption worker

FILED
AUG 24 1978
JUVENILE REGISTER

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

IN THE MATTER OF TAURUS FINNEY, a minor

File No. 78-15722-AV

JAMES RIDELLA P 22858
Deputy Public Defender
Guardian Ad Litem

KATHRYN J. SEDO P 26339
Attorney for Appellant Deborah Finney

ROBERT F. GILLETT P 29119
Amicus Curiae

OPINION AND ORDER

At a session of said Court held in the City of Ann Arbor, County of Washtenaw, Michigan, this 26th day of October, 1979.

PRESENT: HONORABLE HENRY T. CONLIN, CIRCUIT JUDGE

This case involves a termination of parental rights, where the parents have been convicted of felonies and face jail terms of more than two years. The record reveals the following facts.

Deborah Finney was convicted of carrying a pistol in a motor vehicle on January 1, 1974, of attempted possession of heroin on November 4, 1977, and of delivery of heroin on November 10, 1977. On December 21, 1977, while serving her prison sentences for these crimes, she was referred to the Department of Social Services (DSS) because she was pregnant and in prison. On December 28, 1977, DSS contacted Ms. Finney's sister, Michelle Thomas, to ask if she would take care of the child once it was born. Ms. Thomas was already caring for Ms. Finney's two year old daughter, and initially refused to care for the baby once it was born. The record is in dispute as to Ms. Thomas' willingness to care for this child after it was born. A baby girl, Taurus, was born to appellant on March 17, 1978. DSS obtained an ex-parte order dated March 23, 1978 giving DSS temporary custody and authority to place Taurus in foster care, which was done. The petition for termination of parental rights was filed on March 29, 1978, following which several preliminary hearings

were held in this matter. Prior to the final trial, two home studies were performed at Ms. Thomas' home. A foster care study determined that Ms. Thomas' home was adequate, but an adoption study indicated it was inadequate. The child's natural father, Mr. Martin Cowens, was in minimum security in a pre-parole program. His exact release date was unknown. Following the trial, Probate Court Judge O'Brien issued an order and opinion terminating appellant's parental rights. Ms. Finney appeals.

Appellant first argues that the probate court lacked jurisdiction over Taurus, and thus lacked authority to terminate appellant's parental rights. Whatever power the probate court has, it gains from the constitution and statutes; it has no inherent power. Fritts v Krugh, 354 Mich 97 (1958). In the instant case, the probate court found it had jurisdiction under MCLA 712.2(b). At no point in the proceedings does this court perceive an abuse by the probate court in its exercise of jurisdiction. The first hearing presented uncontroverted evidence establishing jurisdiction. At the second hearing, the willingness and ability of Ms. Thomas to care for the child was disputed, but not determined. At both hearings the probate court acted properly in maintaining jurisdiction, which is interwoven with the findings necessary for termination. This Court does not find any abuse of discretion by the probate court in its evaluation of the evidence presented. Appellant's argument is that Ms. Thomas' home was available, and by providing Ms. Thomas' home and care, appellant no longer fell within the provisions of MCLA 712A.2(6). This point is not as "conclusive" as appellant contends. There was testimony presented to dispute both the willingness and ability of Ms. Thomas to care for the child. It is outside the province of this Court in its appellate capacity to substitute its judgment for that of the probate judge, who was able to assess and weigh the credibility of the witnesses. If this Court finds sufficient evidence in the record to support the finding of the probate court on this matter, then it must affirm. The Court does find sufficient evidence to establish jurisdiction in the probate court.

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Having found jurisdiction under MCLA 712A.2(6), the probate court could properly turn to the consideration of termination of parental rights. MCLA 712A.19a. The probate judge found appellant came under both provisions of MCLA 712A.19A(d), which reads:

> Where a child remains in foster care in the temporary custody of the court following the initial hearing provided by section 19, the court may make a final determination and order placing the child in the permanent custody of the court if it finds any of the following:
>
> ---
>
> (d) A parent or guardian of the child is convicted of a felony of a nature as to prove the unfitness of the parent or guardian to have future custody of the child or if the parent or guardian is imprisoned for such a period that the child will be deprived of a normal home for a period of more than 2 years.

Because the second criteria of subsection (d)("imprisoned for such a period that the child will be deprived of a normal home for a period of more than 2 years") is satisfied in this case, it is not necessary for the Court to discuss the constitutional issues addressed to the termination of parental rights due to the nature of the felony.

According to the record, the earliest time that appellant could be released from prison would be 1985. Having found the child is currently without a normal home in establishing jurisdiction under MCLA 712A.2(b), this sentence leads to the reasonable conclusion that Taurus would continue to be "deprived of a normal home for a period of more than 2 years." Recognizing the high standard of proof required in these proceedings, that of clear and convincing evidence, In The Matter of LaFlure, 48 Mich App 377 (1973), the Court is convinced that the probate court acted properly, and in the best interests of the child, in terminating appellant's parental rights.

Appellant argues, via the brief of the amicus curiae, that a termination of the parental rights because of the length of time of parental absence -- while non-incarcerated parents' rights may not be terminated due to absence -- constitutes a violation of the equal protection of the laws as secured by the Fifth and Fourteenth Amendments to the United States Constitution. As the Guardian Ad Litem notes, this is a misstatement of the law in Michigan. Absence by a non-incarcerated parent can be grounds for termination of parental rights. MCLA 712A.2(b)(1); MCLA 712A.19a(a). Contrary to what the amicus curiae implies, MCLA 712A.19a(d) does not allow termination of parental rights

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based solely on the length of incarceration. In re Kidder, 61 Mich App 451 (1975). It also requires that the child be deprived of a normal home during the incarceration. This second requirement was found in this case.

THEREFORE the judgment of the probate court is affirmed.

HENRY T. CONLIN, CIRCUIT JUDGE

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Grand Rapids, on the eleventh day of April in the year of our Lord one thousand nine hundred and eighty

Present the Honorable
Daniel F. Walsh
Presiding Judge

Donald E. Holbrook, Jr.
Robert B. Burns
Judges

IN THE MATTER OF TAURUS FINNEY, a Minor

WASHTENAW COUNTY DEPARTMENT OF SOCIAL SERVICES,
Plaintiff-Appellee,
-v-
DEBORAH FINNEY,
Defendant-Appellant,
and
CENTER FOR URBAN LAW - amicus curiae.

No. 49862
L.C. # 78-15722-AV

In this cause an application for leave to appeal and motion for waiver of fees are filed by defendant-appellant, and a motion for leave to file brief amicus curiae having been filed by the Center for Urban Law, and answers in opposition thereto having been filed by plaintiff-appellee and guardian ad litem, and due consideration thereof having been had by the Court,

IT IS ORDERED that the motion to waive fees be, and the same is hereby GRANTED; and,

IT IS FURTHER ORDERED that the application for leave to appeal be, and the same is hereby DENIED for the reasons stated in the opinion of the learned circuit judge; and,

IT IS FURTHER ORDERED that the motion for leave to file brief amicus curiae be, and the same is hereby DENIED as moot.

STATE OF MICHIGAN--ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 23rd day of April in the year of our Lord one thousand nine hundred and eighty

Ronald L. Dzierbicki
Clerk

CAM 180

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Room, in the City of Lansing, on the 3rd day of

October in the year of our Lord one thousand nine hundred and eighty.

Present the Honorable

MARY S. COLEMAN,
Chief Justice.

THOMAS GILES KAVANAGH,
G. MENNEN WILLIAMS,
CHARLES L. LEVIN,
JOHN W. FITZGERALD,
JAMES L. RYAN,
BLAIR MOODY, JR.,
Associate Justices

CR 30-50
(30-50a)

In the Matter of Taurus Finney,
a minor

DEBORAH FINNEY,

Appellant.

S Ct: 65140
COA: 49862
LC: 78-15722

On order of the Court, the motion to proceed in forma pauperis is considered and it is GRANTED.

The delayed application for leave to appeal is considered, and while it is being considered, this Court, pursuant to GCR 1963, 865.1(7) REMANDS the case to the probate court for the county of Washtenaw for an evidentiary hearing and findings of fact by the probate judge as to (1) the current status of appellant, her sister, her husband, her daughter born March 17, 1978, and her daughter's natural father; (2) placement alternatives presently available. The probate judge also may make a present recommendation as to custody and placement. These findings and a transcript of proceedings are to be filed with the clerk of this Court within 60 days of the certification of this order.

We retain jurisdiction.

STATE OF MICHIGAN — ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 3rd day of October in the year of our Lord one thousand nine hundred and eighty.

Clerk.

Deputy

IN THE PROBATE COURT FOR THE COUNTY OF WASHTENAW

STATE OF MICHIGAN

IN THE MATTER OF

TAURUS FINNEY

Minor

FINDINGS OF FACT AND RECOMMENDATION OF COURT

On October 3, 1980, pending consideration of Delayed Application for Leave to Appeal, the Michigan Supreme Court remanded the case "...to the Probate Court for the County of Washtenaw for an evidentiary hearing and findings of fact by the Probate Judge as to (1) the current status of appellant, her sister her husband, her daughter born March 17, 1978, and her daughter's natural father; (2) placement alternatives presently available. The Probate Judge also may make a present recommendation as to custody and placement."

The case quickly took on dimensions of an adjudication hearing, in an effort to reveal and evaluate all available facts pertaining to the case. The hearing covered the greater part of seven days over eleven weeks time. Witnesses for the Appellant-Mother included a Director of the Community Training Program in which the mother has been participating, a sister of the mother, a prison supervisor, a prison employee, and the mother herself.

Witnesses for the Appellee-Michigan Department of Social Services included three Michigan Department of Corrections employees holding various offices, the Department of Social Services Adoption Specialist in charge of this child's case from the date of the Probate Court termination of parental rights (August 24, 1978), a child psychologist and a child psychiatrist.

Exhibits included extensive case records of the Department of Social Services, various reports, evaluations, and materials concerning the STOP (Community Education) Program in which the mother had been participating.

The child Taurus F- (DOB 3/17/78) who is nearly three years of age, is in a licensed foster home where she has been since 10 days after birth, under the supervision of the Michigan Department of Social Services. She has had a single

[illegible] rights were terminated by Washtenaw County Probate Court.

The mother was under sentence in Huron Valley Women's Prison at the time of the birth. In September, 1980 she was placed in a Department of Corrections Community Program in Lansing, and entered into an educational-training program called STOP, preparing for employment as an auto parts clerk. She was then living in a type of halfway house called New Way, with considerable freedom of movement, both within the community and also on pass for visits to her home community in Wayne County. During the course of these hearings a behavior incident occurred at New Way following which the mother was placed in secure detention in the Ingham County Jail, followed by a factual hearing, and as a result the mother is now being re-classified and returned to Huron Valley Women's Prison. In 90 days she would be eligible to request return to a community program. Her present parole date is 1983.

The legal husband of the mother, James Finney, who is apparently not the putative father, was subpoenaed to appear and did so, but left before he could be called to testify and never returned. His rights were terminated in the original adjudication and there is no evidence whatsoever that he has any serious interest in or the most minimal plan for the child.

The putative father of the child is Martin Cowen, also known as Thaddeus Russell. His rights also were terminated at the original adjudication. It appears that he was in prison, escaped and was later picked up, and is presently in the Michigan Prison System. He has made no appearance or inquiry with respect to the present hearing and there is no evidence that he has any serious interest in or the most minimal plan for the child.

Mere passing reference was made by the mother as to possible placement of the child with the maternal grandmother who apparently lives in the vicinity of Baldwin, Michigan, and is the present caretaker for one of the mother's older children. Other than the presence of the other child in the home of this grandmother no evidence whatsoever was presented as to the suitability of this home as a placement for Taurus.

Michelle Thomas, maternal aunt of the child, is the only person presented as offering any alternative placement for the child other than the foster home where she has been from birth to date. Ms. Thomas was interviewed by Katherine

- -

[illegible] the Department of Social [illegible]

also was present to testify on behalf of the mother. [illegible]

two children of her own and also Aleko, a 4½ year old daughter of Mrs. Finney. Michelle Thomas has never seen Taurus but says she would take care of the child and take good care of her until such time as the mother is "situated to take her." There is considerable uncertainty as to the terms upon which Mrs. Thomas would be willing to take Taurus, for she indicated she would not wish to be a mere short-term temporary caretaker only to have the child abruptly removed from her.

Three expert witnesses testified from as many viewpoints and insights. Their ultimate findings however were similar if not identical.

The child has lived almost three years with a married couple. There are other children, either by previous marriage or foster placement, in the home. Taurus knows these people as parents, an attachment referred to as psychological parents. The attachment is complete for a three year old. The child's health and development point to appropriate care and nurturing. She was always described as a happy, secure child. These people would adopt her if legally possible, although she was not placed with them for that purpose, for she has been in their care since age 10 days, before any termination was undertaken.

While all relative evaluation or comparison of homes has been disregarded, testimony shows the maternal aunt to be a person within the scope of possibility and capability.

Is there a compelling reason to take the child from the only home she has ever known, place her in a strange home with an adult and among children she has never met, for a period of indeterminate duration with the intent of removing her again to a second strange home if and when her mother completes her term and "gets situated"? If there is any compelling reason to do this, is Deborah Finney a proper mother to have this child at some undetermined future date? The testimony and report of Dr. Steven C. Cook sheds the greatest light on the threatened and needless potential danger to the child if she is to be moved again and again. The conclusions of the child psychiatrist in his written report were substantially strengthened by his testimony by both direct and under cross-examination. His conclusions likewise were corroborated by both the DSS caseworker and the child psychologist. This would be an experience to the child similar to the sudden death of both parents, and in

[illegible] that if the natural mother's recurring experience of similar [illegible]. And to what end. The child would be placed on a temporary basis with the maternal aunt, a total stranger, where the mother will be incarcerated and unavailable for still an indeterminate period. The mother's capability as a mother can only be judged by her experience with and treatment of her two older children, whom she has "mothered" only slightly and intermittently in the span of their lives. No one denies that Deborah Finney has a love for her children, but she has amply demonstrated that such love has not induced her to such control of her own life as to render her available to express that love by providing the children with continuing secure nourishing care. Her primary consideration has been for herself, not for her children. If or when she learns such impulse control to turn her own life around, two of her children are out there living in different homes and presumably available for her to take again if she can provide a home for them. Taurus however has been preserved from the unfortunate shifting from place to place/"parent to parent" by well-planned and fortunate placement from birth. It is the court's unqualified recommendation that Taurus should remain in the foster home and that adoption should be pursued. The guardian ad litem concurs with the court and the Department of Social Services in this recommendation.

S/

LOREN W. CAMPBELL
Probate Judge
Juvenile Division

Dated: 2/2/81

Jacqueline Dolores

Room, in the City of Lansing, on the ... day of

July in the year of our Lord one thousand nine hundred and eighty two.

Present the Honorable

MARY S. COLEMAN,
Chief Justice.

THOMAS GILES KAVANAGH,
G. MENNEN WILLIAMS,
CHARLES L. LEVIN,
JOHN W. FITZGERALD,
JAMES L. RYAN,
BLAIR MOODY, JR.,
Associate Justices

3/October 1981

In the matter of the
Child F, a Minor,

DEBORAH FINNEY,

Appellant. SC: 65140

On order of the Court, this Court having granted leave to appeal and having heard oral argument in this matter, and it appearing that ultimate decision in this matter will be aided by amplification of the record,

It is hereby ORDERED that this case be REMANDED to the Washtenaw Probate Court. On remand the court is directed to explicate the basis for its assumption of jurisdiction in this matter pursuant to MCL 712A.2(b); MSA 27.3178(598.2b), and for its disposition of this matter pursuant to MCL 712A.192(d); MSA 27.3178(598.19a). With respect to both the assumption of jurisdiction and the disposition, the court is directed to make findings of fact concerning the propriety of a possible temporary and/or permanent placement of the child in question with her aunt. The amplification noted supra is to be made and filed with the clerk of this Court within 30 days of the date of this Court's order. Supplemental briefs, if any, are to be filed no later than 30 days thereafter. We retain jurisdiction.

STATE OF MICHIGAN — ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 7th day of July in the year of our Lord one thousand nine hundred and eighty two.

Clerk.

SEP 0 7 1982

STATE OF MICHIGAN

IN THE PROBATE COURT FOR THE COUNTY OF WASHTENAW

JUVENILE DIVISION

IN THE MATTER OF THE CHILD F., A MINOR /

SCT 65140

Petition 79-136

FINDINGS OF FACT AND EXPLICATION OF THE COURT

By Order #SC 65140 the Supreme Court remanded the above-matter to the Probate Court of Washtenaw County and directed the Court to "explicate the basis for its assumption of jurisdiction in the matter pursuant to M.C.L.A. 712A.2(b), M.S.A. 27.3178 (5982b) and for its disposition of this matter pursuant to M.C.L.A. 712A.19a(d); M.S.A. 27.3178 (598.19a). With respect to both the assumption of jurisdiction and the disposition the Court is directed to make findings of fact concerning the propriety of a possible temporary and/or permanent placement of the child in question with her aunt. The amplification noted supra is to be made and filed with the clerk of the Court within 30 days of the date of this Court's Order." The Court received the Order on August 10, 1982 and immediately began to carry out the assignment. The Court reports as follows:

FINDINGS OF FACT

A. Assumption of Jurisdiction Pursuant to M.C.L.A. 712A.2b. The Court finds by clear and convincing evidence that:

1. Deborah F-- was convicted of carrying a concealed weapon in an automobile on January 1, 1974. Tr. at 34, 36.
2. Deborah F-- was incarcerated upon her conviction for carrying a concealed weapon. Tr. at 41.
3. Deborah F-- escaped from the correctional institution. Tr. at 43, 46.
4. During Ms. F--'s escape, Taurus was conceived by Deborah F-- and Martin Cowens aka Thaddeus Russell. Tr. at 87.
5. Deborah F-- committed the felony of attempted possession of heroin during this escape. Tr. at 43.
6. Deborah F-- was convicted of attempted possession of heroin on November 4, 1977 and sentenced to a term of one to two years. People's Exhibit A.
7. Deborah F-- committed the felony of delivery of heroin during her escape. Tr. at 43.
8. Deborah F-- was convicted of delivery of heroin on November 10, 1977 and sentenced to a concurrent term of 10 to 20 years. People's Exhibit B.
9. Deborah F-- gave birth to Taurus on March 17, 1978 while serving her sentence at Huron Valley Women's Correctional Facility. Tr. at 15.
10. At the time of trial, Deborah F--'s earliest release date would occur March 23, 1985, 6 years, 8 months from the date of trial.
11. Inmates are not permitted to have physical custody of their child while incarcerated. Tr. at 13.

Therefore, Deborah F-- could not provide proper care for Taurus at the time of trial.

12. Michelle Thomas, sister of Deborah, was willing to provide care for Taurus,but only under the conditions that the placement be permanent and that she be given authority to decide when, and if Deborah was capable of regaining custody. Tr. at 95.

13. There was no evidence presented at trial that Deborah F-- agreed to Ms. Thomas' conditions.

Therefore, because her requirement for conditions could not be guaranteed by the Court, Michelle Thomas was not available to provide temporary foster care for her niece.

14. The jurisdiction for adoption lies within the county of residence of the adopting parents [M.C.L.A. 712.24(1)].

15. Oakland County was the county of residence of Ms. Thomas. Tr. at 88.

16. The Oakland County adoption authorities disapproved of Ms. Thomas' home for adoption purposes. Tr. at 18.

17. Martin Cowens, the putative father, was incarcerated at the time of trial. Tr. at 16.

18. James Crawford, Deborah F--'s husband at the time of trial, could not be located for trial and has shown no interest in Taurus. Tr. at 4.

19. No other relative was found who was willing to care for Taurus.

Therefore at the time of trial, Taurus F-- was found in Washtenaw County without proper custody and guardianship and thus came within the jurisdiction of the court pursuant to M.C.L.A. 712A.2(b).

B. Termination of Parental Rights Pursuant to M.C.L.A. 712.19a(d). The findings of fact contained in Section I A 1-16 supra are incorporated by reference.

The Court finds by clear and convincing evidence that:

1. Deborah F-- was convicted of a felony of a nature as to prove her unfitness to have future custody of Taurus F--.

2. Deborah F-- was involved in heroin traffic during her escape from prison. Tr. at 41, 43.

3. Deborah F-- used her sister's name, Michelle Thomas as an alias while engaged in heroin traffic. Tr. at 26 line 25. Tr. at 27 lines 1,2,3. Tr. at 29 lines 16-20, Tr. at 29 lines 21-25. Tr. at 30, 1,2, 12, 13, 15, 16.

4. Absent a termination of Deborah F--'s parental rights, Taurus would be subject to temporary foster care for over six years.

5. A child in temporary foster care is deprived of a normal home. Tr. at 54, 57, 60.

6. A child needs a permanent family for optional growth and development. Tr. at 53, 55, 65.

7. Deborah F--'s imprisonment will deprive Taurus of a normal home for more than two years, to wit, six years and eight months. Tr. at 60.

Therefore, Taurus' best interests require the court to terminate all parental rights of Deborah F--, Martin Cowens and James Crawford and to take permanent custody of Taurus, thereby freeing her for adoption.

APPENDIX

At trial, the home of Ms. Thomas, sister of Deborah F--, was suggested as a possible temporary placement for Taurus. The placement depended upon the suitability of the home and the willingness of Ms. Thomas to accept the child. However, Ms. Thomas demanded a level of control and permanence which was inconsistent with temporary foster care.

Paul Thiefels, a caseworker with the Washtenaw County Department of Social Services quoted on the witness stand a letter received from Howard Russell, Director of the Oakland County Department of Social Services. The subject of the letter was Michelle Thomas, and her willingness to care for her niece.

> Michelle has discussed the new baby with her sister and has made her feelings very clear. Michelle is willing to take care of the baby and raise it. The only condition is that the baby is legally hers and Deborah cannot come back after her incarceration and try to take the baby. It would not be fair to the child and the foster care worker agrees with this. Since Michelle has taken care of Alaka (Taurus' sister) since birth and is trying to obtain custody she does not want the hassle with this again. The worker feels that it's very realistic for Michelle to feel this way. She does not want to raise two children with no permanent rights, and have Deborah be able to take her away whenever she wants. She did say that Deborah could visit the baby whenever she wanted and she could tell the child that Deborah was her mother. But Michelle must have permanent custody of this child. Tr. at 71.

Ms. Thomas herself testified that she wanted control of Taurus' future.

> I would have the say in the matter as far as the mother and father is concern. They couldn't just walk out of prison and take her. You know, without providing to me that, you know, first they were able to handle a child. Tr. at 93.
>
> ...when they can prove to the court and to me that they are able to take the child then they can take the child. Tr. at 95.

Ms. Thomas amplified the above statement on page 95 of the record.

> I felt that if...if my sister did get out that she would not be capable of taking a child and that she would have to prove to me that she was able to take the child, meaning staying off drugs, quit hanging with her friends, getting her a nice job, getting her a nice place to stay and then she could have her children back.

Under cross examination Ms. Thomas was asked if she was willing to keep the child until the putative father, Martin Cowens, obtained release from prison and set up a household. With assurances that Mr. Cowens would be re-

quired to obtain prior court approval for the plan. Ms. Thomas appeared to agree. Tr. at 96-97. But after she was excused from the witness stand and while all the parties were still present, she put the following question: "If it doesn't work out for him, you know, everything doesn't work out right when he gets the child then what happens?" Tr. at 97. The Court responded by saying that would be something that the court would have to decide. Ms. Thomas then said "I am saying after you decide that he is capable of taking the child and things don't work out keeping the child, her living standards aren't right, things, you know, things fall apart for him and his job and what have you, then where does the child go, back to the State or back to me?" The court explained that the matter would have to be decided at a later time when the issue arose. The court then asked her if this made a difference "to you whether you are going to take the child or not?" Tr. at 97. Her answer: "Not really but I mean I look at it this way. There is no need for the child to be pulled back and forth when it is not necessary when she can just stay with me and he can have visitation rights." Tr. at 98.

It is the opinion of the court after observing the witness and hearing her testimony that while under pressure of cross examination Ms. Thomas was willing to say that she would take the child without adoption. Nevertheless, she had serious misgivings about success of the outcome and little faith in the ability of the parents to carry out their obligation, and she still expected a level of control and permanence which was inconsistent with foster care, and which the court could not guarantee by any order other than adoption.

There was no evidence presented at trial that Deborah F-- agreed to Michelle Thomas' conditions. After hearing the testimony and observing the witnesses, the court concluded the temporary placement with Ms. Thomas was not appropriate.

The trial record shows that the Department of Social Services explored the possibility of the adoption of Taurus by Michelle Thomas. Ms. Marilyn McAllister, adoption worker for the Oakland County Department of Social Services, testified that she made an investigation of the home at the request of Washtenaw County Department of Social Services. She testified that she had worked as and adoption worker for 15 years in Oakland County and she

was a graduate of the Michigan State University with a Bachelor's degree in Social Work. Tr. at 17. She testified that she disapproved of the home for adoption purposes because of the crowded conditions, and the limited sleeping quarters, which would include four children in one bedroom, eight by eight feet in dimension. Tr. at 18, 23. Michelle Thomas, who was twenty-three years old, was not at home from 5:00 a.m. until 3:30 p.m. because of her job at the Wixom Ford Plant. Tr. at 18, 89. She planned to hire a babysitter to supervise the children until she returned from work. The babysitter was eighteen years old and had a one year old child of her own which she would keep with her during the day while supervising the Thomas' home. Tr. at 18. Upon her return from work, the babysitter would leave, and Ms. Thomas usually slept, leaving her six year old daughter to supervise the other children. Tr. at 18.

Ms. Thomas denied that she left her children unsupervised, and testified that she intended to add a room to the house. Tr. at 90, 92. Before the addition was completed, Ms. Thomas planned to have the children occupy the two bedrooms, while she would sleep in the furnished basement. Tr. at 91. She testified that she had two children, ages six and four, and that she also cared for two year old Alaka,Deborah F--'s daughter, who had been with Ms. Thomas since she was a week old. Tr. at 89, 90.

Under cross examination, Mr. Thiefels read from a letter written by Howard E. Russell, Director of Oakland County Department of Social Services which read in part:

> The foster care worker feels that Ms. Michelle Thomas could provide an adequate home for her niece. Tr. at 68.

Neither Mr. Russell nor the foster care worker were called as witnesses to testify under oath, and their statements were not tested by cross examination.

It is the opinion of the court that the sworn testimony of Ms. McAllister about the suitability of Ms. Thomas' home out weighs the unsworn, untested report of the unnamed foster care worker. Although the testimony of Ms. McAllister applies to adoptive placement, her opinion would also apply with equal force to long term temporary placement with Ms. Thomas. While the testimony did not indicate that Ms. Thomas herself was an unfit person to have care and custody of children, the court was of the opinion that due to the crowded conditions, the questionable supervision, and the testimony of

Ms. McAllister, it would not be appropriate to place a fourth child, a four month old baby in the Thomas home.

For the foregoing reasons, the Court declined to place the child with her aunt, Michelle Thomas.

DISPOSITION

In making disposition, the court followed the principle that the best interest of the child is paramount. Permanency and a sense of security are essential for the welfare and healthy development of Taurus or any child of her age. Dr. Judith Kleinman testified to that effect:

> ...the optional development in an infant through childhood is served by having consistent parents who are present over time so the child can develop a sense of reliability and permanence. Tr. at 55.

Dr. Kleinman gave her opinion of the effect on a child of a change in parents at the age of six or seven years.

> A child at that age would interpret really losing their whole structure in a very self-centered way. It would be experienced as something they had caused by being bad and there is a rejection as well as a loss. ...it would...effect the person's ability to have good close relationships with other people. Tr. at 52.

The court had a choice. It could place the child in temporary custody but this would mean temporary custody for six years and beyond. The court could only conjecture that would happen at the time of the mother's release from prison, but certainly there would be a disruption of the child's living arrangement.

On the other hand, by terminating parental rights, the court could place the child with an adoptive agency that could use all its skills to find a good, stable home, with parents consistently present, enabling Taurus to develop a sense of reliability and permanence. This would not necessarily rule out future adoptive placement with Ms. Thomas. However, wherever the placement, it would be permanent. The adopting parents would be Taurus' legal parents. They would have control over her, protected from interference by the biological parents.

At the time of trial the court found that Ms. Thomas' home was not approved for adoptive placement by the Oakland County authorities. Ms. Thomas was prepared to take Taurus on a temporary basis only upon certain conditions that were not agreed to by the mother and which the court could not guarantee.

Therefore, in view of the entire record, the court found by clear and convincing evidence that termination of parental rights and placement with an agency for purposes of adoption was in Taurus' best interest.

Respectfully submitted,

DATED Sept. 3, 1982 Francis L. O'Brien

FRANCIS L. O'BRIEN
Retired Probate Judge
Acting on Assignment

cc: counsel for mother
counsel for petitioner
gaurdian ad litem
SDSS worker
court worker
file
Judge Henry Conlin

STATE OF MICHIGAN

IN THE PROBATE COUNT FOR THE COUNTY OF WASHTENAW

JUVENILE DIVISION

IN THE MATTER OF THE CHILD F., A MINOR

SCT 65140

Petition 79-136

Report submitted September 3, 1982 is amended as follows:

FINDING OF FACTS

Page 3, paragraphs 14 thru 19 are amended by substitution as follows:

14A. Jurisdiction for adoption lies with the county of residence of the adopting parents (Oakland County) or the county where the child is found (Washtenaw County). [M.C.L.A. 712.24(1)].

15A. Oakland County was the residence of Ms. Thomas. Tr. at 88.

16A. Ms. Thomas was not eligible as an adoptive parent because her divorce was not final and because her home was not approved by the Oakland County adoption authorities. Tr. at 18. Tr. at 92 and 93.

17A. At time of trial no petition for adoption of Taurus was before the Court.

18A. Martin Cowens, the putative father, was incarcerated at the time of trial. Tr. at 16.

19A. James Crawford, Deborah F--'s husband at the time of trial, could not be located for trial and has shown no interest in Taurus. Tr. at 4.

20A. No other relative was found who was willing to care for Taurus.

Therefore at the time of trial, Taurus F-- was found in Washtenaw County without proper custody and guardianship and thus came within the jurisdiction of the court pursuant to M.C.L.A. 712A.2(b).

DATED September 9, 1982

Francis L. O'Brien

FRANCIS L. O'BRIEN
Retired Probate Judge
Acting on Assignment

cc: counsel for mother
counsel for SDSS
guardian ad litem
Circuit Court
SDSS worker
file

ms

REQUEST FOR PETITION
Probate Court for Washtenaw County

(Original & 1 copy to be sen court. Copy will be used for reply.)

Concerning Baby Girl Child Finney Born: March 17, 197
Complainant Paul Thiefels of Department of Social Services
Address _____ Phone: _____
Child now with _____ at Women's hospital
Parents Debra Finney AKA Michelle Books and Martin Cowens AKA Thaddeus Russell
Address, if different than above _____
Parents divorced: (yes) (no); in _____ Court
Child attends _____ School in _____ Grade
and belongs to _____ Church
Race:

I represent that the above named child(ren) is/are neglected/delinquent, within the meaning of Sec. 2, Chapter 12A, of the Probate Code, for the following reasons: (please state facts of situation)

see attached page

w/o prop custody
w/o prop care + support

This matter has previously been referred to _____
Previous court experience (yes) (no) When? _____
Name of relatives or interested parties: _____
Attitude of child: _____
I am informed that the child(ren) is/are not under prior jurisdiction of any court.

March 23/78
Date Signed

Paul Thiefels
Signature of Complainant

Please do not write below this line.

COURT ACTION TAKEN

Petition authorized and case assigned to _____
Dated of Hearing _____
Adjusted at Intake:
(a) Screened and no further service
(b) Short-term observation & service
(c) Referred to:
Private agency _____
County Welfare _____
Police Department of _____
State Department of Social Welfare _____
Priest or Minister _____
Informal counseling to _____
School authorities _____
Clinic _____

_____
Signature of Court Worker

69A

FINNEY, Baby Girl

Request for Petitio..
Probate Court for Washtenaw County

*COMES WITHIN THE PROVISIONS OF ACT NO. 54, PUBLIC ACTS OF MICH 1944, FIRST EXTRA SESSION AS AMENDED, being MCLA 712A.2(b) whose parent legally responsible for the care and maintenance of such child, when able to do so, neglects or refuses to provide proper or necessary support,...or who is otherwise without proper custody or guardianship to wit:

the mother is presently detained in the Huron Valley Women's Facility;

that the mother will remain incarcerated at least until 1985;

that the mother is unable to provide adequate care for her child through her relatives;

that the known relatives are unable or unwilling to care for the child;

that the putative father of the child is incarcerated at Camp Cusino in Singleton, Michigan;

that the putative father will remain incarcerated until _____;

that the best interest of said child requires termination of parental rights and placement for adoption.

Paul Phipps
3/23/78

FILED

MAR 23 1978

70A

PROBATE FORM — ORDER — 4007

State of Michigan,

The Probate Court for the County of WASHTENAW

In the Matter of the TAURAS FINNEY

At a session of said Court, held on the 23rd day of March A. D. 19 78

Present, Hon. FRANCIS L. O'BRIEN, Judge of Probate.

In this cause it appearing to the Court that there are reasonable grounds to believe that conditions or surroundings under which the above named minor child lives are such as to endanger health, morals or welfare, and that it would be for the best interests of said minor to be placed in a licensed foster home, or in hospital care if appropriate, under the supervision of the State Department of Social Services pending further hearing in this cause;

IT IS NOW THEREFORE ORDERED that the above named minor child be placed in a licensed foster home, or in hospital care if appropriate, under the supervision of the State Department of Social Services, pending hearing on April 3, 1977 at 11:00 am. without prejudice to the rights of the parent of said child.

IT IS FURTHER ORDERED that the above named minor is not to be removed from this placement without permission of the Juvenile Division of the Probate Court, until further order of the Court

IT IS FURTHER ORDERED that the State Department of Social Services be authorized to pay the expense necessarily incurred in such placement.

Francis L. O'Brien

FRANCIS L. O'BRIEN
Judge of Probate
Juvenile Division

Original: Court

CC: Department of Social Services
Parents
Placement
Court worker
Counsel

File No.

PETITION—Juvenile (...er—(Act 54 of Extra Session of 1944) 6256—(Rev. 1944)

78-136

State of Michigan,

CAUSE NO.....

The Probate Court for the County of.....WASHTENAW.....

Juvenile Division.

In the Matter of the Petition Concerning.....TAURAS FINNEY.....

MINOR.

I,.....Paul Thiefels.....respectfully represent that I reside in the.....City.....of.....Ann ARbor.....in said County, and make this petition as...Caseworker-Protective Services.....

I further represent that said...TAURAS FINNEY.....is a resident of the...City of Ann Arbor.....in.....Washtenaw.....County, and is now residing with and under the custody and control of .....Foster Care.....and...she.....was born on...March 17, 1978.....

I further represent upon information and belief that said child....., on or about, to-wit, the .....28th.....day of.....March....., A. D. 19.78..., in said County of...Washtenaw.....

* COMES WITHIN THE PROVISIONS OF ACT NO. 54, PUBLIC ACTS OF MICHIGAN 1944, FIRST EXTRA SESSION AS AMENDED: being MCLA 712A.2(b) whose parent legally responsible for the care and maintenance of such child, when able to do so, neglects or refuses to provide proper or necessary support, or who is otherwise without proper custody or guardianship to wit: the mother is presently detained in the Huron Valley Women's Facility; that the mother will remain incarcerated at least until 1985; that the mother is unable to provide adequate care for her child through relatives; that the known relatives are unable or unwilling to care for the child; that the putative father of the child is incarcerated at Camp Cusino in Singleton, Michigan; that the putative father will remain incarcerated until ____; that the best interest of said child requires termination of parental rights and placement for adoption. Said child is therefore subject to proceedings under Chapter XIIA Section 2(b) of the Probate Code.

I further represent that the names, relationship, ages and residences of nearest of kin and guardian of said child....., as I am informed and believe, are as follows:

NAME	RELATIONSHIP	AGE	RESIDENCE
Debra Finney aka Michelle Hooks	Mother	Adult	3155 Bemis Rd, Ypsilanti 48 Huron Valley Correctional Facility
Martin Cowen akd Thaddeus Russell	Putative Father	Adult	P.O. Box 51 Camp Cusino, Shingleton, MI 4998
James Crawford Finney	Legal father	Adult	UNKNOWN

I therefore, pray that the Juvenile Court take jurisdiction of said child.

.....

P. O.....Paul Thiefels.....

Subscribed and sworn to before me this...29th.....day of....March.....A. D. 19.78..., at.....Ann Arbor....., Michigan.

.....

Notary Public,.....Washtenaw.....County, Michigan.

My commission expires....January 7.....19.81....

A preliminary inquiry having been made from which it appears that the interest of the public and said child require that formal jurisdiction be acquired by this Court, therefore the filing of the foregoing petition is hereby authorized.

Dated.....MAR 29 1978..... .....FRANCIS L. O'BRIEN Judge of Probate.

FILED

MAR 29 1978

Filed.....day of.....A. D. 19.....

pm

JUVENILE REGISTER

.....Probate Register, Juvenile Division.

* Here allege the facts.

State of Michigan,

The Probate Court for the County of ..... WASHTENAW .....

In the Matter of the ..... TAURAS FINNEY .....

At a session of said Court, held on the ..... 3rd ..... day of ..... April ..... A. D. 19 78

Present, Hon. ..... FRANCIS L. O'BRIEN ..... Judge of Probate.

REFEREE'S REPORT AND RECOMMENDATIONS:

PRESENT: Deborah Finney, mother
James Ridella, guardian ad litem
Donald Duquette, Supervising Attorney
Michael Sack, Student Attorney
Paul Thiefels, State Department of Social Services
Mary Fransen, State Department of Social Services
Ava Adler, court worker
Officer Rider, Washtenaw County Sheriff's Department
Officer Hulse, Washtenaw County Sheriff's Department

Preliminary hearing was held by the Referee on Petition 78-136, wherein the State Department of Social Services requests that the Court terminate the rights of the parents of the minor child. Testimony was taken from Mary Fransen, worker for the State Department of Social Services. She stated she has been in contact with the mother since January 1978; that the child was born on March 17, 1978 at Huron Valley Correctional Facility. Witness stated on information and belief that the mother has been incarcerated in prison on drug and weapon charges and will not be eligible for release before 1985; that the mother is still married to one James Crawford Finney, whose whereabouts are unknown, and that the biological father is one Martin Cowen aka Thaddeaus Russell who is incarcerated at Camp Cusino, Shingleton, Michigan and won't be eligible for release at least until May 1979. Witness stated that there are two other children in the family which are being taken care of by relatives, but they are not willing to take the above-named minor into their care.

The child's mother appeared with a written request for appointed counsel, and made no further statement.

Referee's Recommendations Concerning Findings and Disposition:

It is recommended that the filing of the petition be authorized.

It is further recommended that the Court find that the conditions or surroundings under which the child was found are such as to endanger his health, morals or welfare in that a prison for adults is not an appropriate place for the care and nurture of an infant; and that accordingly, the emergency placement of the child in temporary licensed foster care should be authorized and continued without prejudice to the rights of either parent. It is further recommended that counsel be appointed for the mother, that further hearing on the petition be held on Monday, April 10, 1978 at 2:00 in the afternoon and that notice of these proceedings be communicated by summons in the manner provided by law to James Crawford Finney and to Martin Cowen aka Thaddeus Russell.

Robert M. Barrie

ROBERT M. BARRIE
Referee

File No. .....

5055

ORDER OF THE COURT

The above recommendations are approved.

IT IS NOW THEREFORE ORDERED that the above-named minor child be placed under emergency custody of the court, in licensed foster home care, under the supervision of the State Department of Social Services, until further order of the court;

IT IS FURTHER ORDERED that the above-named minor is not be be removed from this placement without permission of the Juvenile Division of the Probate Court, until further order of the court;

IT IS FURTHER ORDERED that counsel be appointed for the mother, Deborah Finney;

IT IS FURTHER ORDERED that summons be issued to James Crawford and to Martin Cowen aka Thaddeus Russell;

IT IS FURTHER ORDERED that the State Department of Social Services be authorized to pay the expenses incurred in such placement;

IT IS FURTHER ORDERED that hearing be adjourned to Monday April 10, 1978 at 2:00 in the afternoon.

Francis L. O'Brien

FRANCIS L. O'BRIEN
Judge of Probate
Juvenile Division

cc: SDSS
mother
Child Adv.
gal
court worker
counsel for mother

FILED

APR 3 1978

JUVENILE REGISTER

pm

AMENDED PETITION #78-136

State of Michigan,

CAUSE NO.

The Probate Court for the County of WASHTENAW

Juvenile Division.

In the Matter of the Petition Concerning TAURUS FINNEY

MINOR.

I, Paul Thiefels, respectfully represent that I reside in the City of Ann Arbor in said County, and make this petition as Caseworker-Protective Services

I further represent that said TAURUS FINNEY is a resident of the Township of Ypsilanti in Washtenaw County, and is now residing with and under the custody and control of Presently placed in licensed foster care and she was born on March 17, 1978

I further represent upon information and belief that said child....., on or about, to-wit, the 18th day of July, A. D. 19 78, in said County of WASHTENAW

* COMES WITHIN THE PROVISIONS OF ACT NO. 54, PUBLIC ACTS OF MICHIGAN 1944 FIRST EXTRA SESSION AS AMENDED: Whose parent legally responsible for the care and maintenance of such child, when able to do so, neglects or refuses to provide proper or necessary support, or who is otherwise without proper custody or guardianship to wit: that the mtoher has been convicted of felonies such as possession of dangerous weapons and drugs; that the mother is presently detained in the Huron Valley Women's Facility; that the mother will remain incarcerated at least until 1985, in excess of two years, that the mother claims one relative, Michelle Thomas, her sister is willing as of the moment to take custody of the child that placement with this aunt is unsuitable for reasons that the aunt is in the proces of obtaining a divorce; has custody of three young children; works full-time, and lacks a permanent and reliable babysitter; that given these circumstances the aunt

I further represent that the names, relationship, ages and residences of nearest of kin and guardian of said child....., as I am informed and believe, are as follows: OV

NAME	RELATIONSHIP	AGE	RESIDENCE
Deborah Finney aka Michelle Hooks	Mother	Adult	Huron Valley Correctional Facility
Martin Cowen aka Thaddeus Russell	Natural Father	Adult	10100 Harper Room 446, Detroit, MI 48213

I therefore, pray that the Juvenile Court take jurisdiction of said child.

P. O. Paul Thiefels

Subscribed and sworn to before me this ...day of ..... A. D. 19....

at Ann Arbor, Michigan.

Notary Public, ... County, Michigan.

My commission expires ..... 19....

A preliminary inquiry having been made from which it appears that the interest of the public and said child require that formal jurisdiction be acquired by this Court, therefore the filing of the foregoing petition is hereby authorized.

Dated FILED

JUL 20 1978

FRANCIS L. O'BRIEN Judge of Probate.

.....day of ..... A. D. 19.... pm

JUVENILE REGISTER

Probate Register, Juvenile Division.

* Here allege the facts

5256—(Rev. 1969) PETITION—Juvenile C... 42—(Act 54 of Extra Session of 19...

is incapable of providing adequate care and supervision for a four-month-old child; that the biological father has been convicted of felonies such as attempted armed robbery and possession of dangerous drugs; that he will be subject to incarceration until May 1979; that pursuant to section 712A.19a(d), of Chapter XIIA, of the Probate Code the parents' respective convictions of the aforementioned felonies establishes their unfitness as parents; that the best interest of said child requires termination of parental rights in this proceeding and placement for adoption. Said child is therefore subject to proceedings under Chapter XIIA, Section 2(b) of the Probate Code.

Paul Thiefels

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

In the Matter of Taurus F., a minor

No. 78-15722AV

CONCISE STATEMENT OF FACTS

I. EVENTS

1. In December, 1977, Ms. Deborah Finney, the Appellant, was referred to the Michigan Department of Social Services by the Michigan Department of Corrections, for the reason that she was pregnant and in prison.

2. On March 17, 1978, a daughter, Taurus, was born to Deborah Finney at the University of Michigan Hospital, Ann Arbor, Washtenaw County, Michigan.

3. Initially, Ms. Thomas, Appellant's sister, was unwilling to take the child. The record indicates that she changed her mind, though she indicated that there were some conditions to this.

4. On March 23, 1977, the Department of Social Services obtained an Ex-parte Order from Washtenaw County Probate Court, Juvenile Division giving them authority to place Taurus in foster care.

5. The Department of Social Services then filed a petition for termination of parental rights in Washtenaw County Probate Court on March 29, 1978, which alleged that Debbrah Finney was unable to care for the child or to provide care through relatives.

6. On April 3, 1978, a preliminary hearing was held in Washtenaw County Probate Court, Juvenile Division. Ms. Finney was represented and made no statements except to request counsel. Mary Franson, a student intern at Department of Social Services, was the only person who testified. She testified that no relatives were able to care for Taurus Finney. The child was continued in foster care.

7. At a second hearing on April 10, 1978, Deborah Finney contested the termination, and Michelle Thomas declared that she was willing to care for Taurus.

8. The hearing of April 10 was adjourned upon the agreement of the Department of Social Services, the guardian ad litem and Deborah Finney, that a foster care study of Ms. Thomas' home would be undertaken.

9. The Department of Social Services foster care study found Ms. Thomas' home to be suitable for foster care placement.

10. The Department of Social Services later did an adoption study in Ms. Thomas' home and found the home unsuitable as an adoptive home site on the grounds that Ms. Thomas was in the process of obtaining a divorce, that she already had custody of three children, that she worked full time, and that she lacked a permanent and reliable babysitter.

11. The Department of Social Services refused to place Taurus Finney in Ms. Thomas' home on a foster care basis even though the home was found suitable by Department of Social Services' own foster care study.

12. The Department of Social Services amended their petition on July 18, 1978 and for the first time alleged that termination should take place because the mother had been convicted of felonies which proved her unfitness as a parent and, because she was imprisoned for a period of time that the child would be deprived of a normal home for more than 2 years, MCLA 5712.19a(d). Exhibit C.

13. A trial was held on July 31, 1978, and the probate judge terminated Ms. Finney's rights for the reasons set forth in the amended petition.

14. At trial, the guardian ad litem recommended against termination of the parental rights of the parents.

15. Deborah Finney appealed the decision to the Washtenaw County Circuit Court.

16. At the trial, the GAL, James Ridella, recommended that temporary custody be continued but not termination of parental rights. On appeal the GAL changed his position and recommended that the termination be upheld.

17. The decision of the Washtenaw County Circuit Court, affirming the Probate Court's decision was signed on October 26, 1979. It was filed on October 31, 1979, and the clerk's notice was mailed on November 6, 1979.

18. On November 21, 1979, an Order signed by Judge Conlin granted Appellant an extra twenty (20) days in which to file her appeal.

II. PERSONAL FACTS

19. Ms. Finney has two other children, a son being cared for by her grandparents and a daughter being cared for by her sister, Michelle Thomas. She sees both children on a regular basis.

20. Deborah Finney saw her daughter Taurus two or three times at the prison before the hearing at which her parental right were terminated.

21. Deborah Finney is presently at Huron Valley Correctional Facility with an "out date" of June, 1983.

22. Deborah Finney was convicted of carrying a concealed weapon in 1973, and attempted possession of heroin and delivery of heroin in August, 1977.

Approved:

Jan Leventer (P28670)
Women's Justice Center
651 E. Jefferson
Detroit, Michigan 48226
(313) 961-0546

Judge Henry W. Conlin, Circuit Judge
Washtenaw County Circuit Court

James Ridella P22858
Deputy Public Defender
Washtenaw County Public Defenders Office
County Building
Ann Arbor, Michigan 48104

James G. Wilson (P28390)
Office of the Prosecuting Attorney
Child Advocacy Law Clinic, of Counsel
1015 E. Huron
Ann Arbor, Michigan 48109
763-5000

Dated: January 7, 19

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

In the Matter of

TAURUS F.,

a minor.

File no. 78-15722-AV

Kathryn J. Sedo (P26339)
Attorney for Appellant
Deborah Finney

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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I.B. M.C.L.A. 712.19a DOES NOT CONFER UPON THE PROBATE COURT ORIGINAL JURISDICTION AND ITS PROVISIONS ARE ONLY APPLICABLE ONCE JURISDICTION HAS BEEN OBTAINED THROUGH M.C.L.A. 712.2(b). 6

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STATEMENT OF QUESTIONS INVOLVED

I. DID THE PROBATE COURT HAVE JURISDICTION OVER TAURUS F. UNDER M.C.L.A. 712.2 TO ADJUDICATE APPELLANT'S PARENTAL RIGHTS?

THE COURT SAID "YES".

APPELLANT SAYS "NO"

II. DOES M.C.L.A. 712.19a CONFER ORIGINAL JURISDICTION ON THE PROBATE COURT?

THE COURT DID NOT ADDRESS THIS QUESTION.

APPELLANT SAYS "NO".

III. DOES M.C.L.A. 712.19a(d) VIOLATE THE DUE PROCESS GUARANTEES OF THE 5TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE IT IS VAGUE?

THE COURT DID NOT ADDRESS THIS QUESTION.

APPELLANT SAYS "YES".

IV. DID THE TERMINATION OF APPELLANT'S PARENTAL RIGHTS VIOLATE THE EQUAL PROTECTION CLAUSE OF THE 5TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE A NON-INCARCERATED PARENT CAN PLACE A CHILD WITH A RELATIVE WHILE APPELLANT WAS NOT ALLOWED TO DO SO?

THE COURT DID NOT ADDRESS THIS QUESTION.

APPELLANT SAYS "YES".

V. WERE THE FINDINGS OF THE TRIAL COURT SUBSTANTIATED BY CLEAR AND CONVINCING EVIDENCE THAT THE APPELLANT HAD BEEN CONVICTED OF FELONIES WHICH PROVED HER UNFITNESS AS A PARENT AND THAT THE CHILD WOULD BE DEPRIVED OF A NORMAL FOR LONGER THAN TWO YEARS WHEN NO EVIDENCE WAS PRESENTED ON THE ISSUE?

THE COURT SAID "YES".

APPELLANT SAYS "NO".

STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
Judges: Walsh, Holbrook, Burns

Court of Appeals No. 49862 | Washtenaw Circuit Court No. 78-15722A | Washtenaw Probate Court No. 1293

In the Matter Of,

TAURUS F_____,

a minor

Supreme Court No. 65140

BRIEF OF AMICUS CURIAE

PRISON LEGAL SERVICES OF MICHIGAN, INC.

By: BEATRICE M. FRIEDLANDER (P 30657)
Staff Attorney
3511 Bemis Road
Ypsilanti, Michigan 48197
(313) 434-6300, Ext. 258

SUSAN M. FAIR
Paralegal Assistant

Adopting the Prison Legal Services of Michigan, Inc. Amicus Curiae Brief:

State Appellate Defender Office

National Lawyers Guild, Detroit Chapter

Michigan Council on Crime and Delinquency

STATEMENT OF QUESTIONS PRESENTED

I. DOES A STATUTE PROVIDING FOR THE TERMINATION OF THE FUNDAMENTAL RIGHT OF RAISING AND CARING FOR ONE'S CHILD, WHICH BASES THE TERMINATION OF PARENTAL RIGHTS UPON THE PARENT'S STATUS AS A CONVICTED FELON OR UPON HER/HIS INCARCERATION, VIOLATE THE CONSTITUTIONAL GUARANTEE OF EQUAL PROTECTION?

AMICI answer, "Yes."

II. IS MCLA 712A.19a(d) INVALID IN THAT IT DOES NOT PROVIDE PROPER NOTICE TO PARENTS OF THE CONDUCT WHICH COMES WITHIN ITS SCOPE AND DOES NOT PROVIDE GUIDANCE TO STATE OFFICIALS AND COURTS, THEREBY ALLOWING ARBITRARY APPLICATION WHICH MAKES THE LAW VOID FOR VAGUENESS UNDER SETTLED PRINCIPLES OF DUE PROCESS OF LAW?

AMICI answer, "Yes."

INTEREST OF AMICI

The Amici are organizations which assist Michigan prisoners in their dealings with the court system, the legislature, the prison administration and governmental agencies in general. As advocates for prisoners, Amici are in regular contact with prison inmates - often on a daily basis - and are in a unique position to observe varied problems which result from incarceration.

Prison Legal Services of Michigan,Inc. ("PLSM") is a not-for-profit corporation whose purpose is to provide legal services to prisoners in areas where they are not otherwise able to secure assistance. PLSM also provides paralegal training to prisoners and then employs its graduates in the organization's two offices, one at the State Prison of Southern Michigan, and the other at the Huron Valley Women's Facility. PLSM provides representation and advice in a full range of civil, criminal and administrative matters.

The State Appellate Defender Office is a state agency which represents approximately 30% of all indigent criminal defendants in Michigan in their appeals. The office represents clients in both direct and collateral appeals; provides criminal defense training for the state bar; and serves as a clearinghouse for the criminal bar. The staff concerns itself with the sociological impact of imprisonment on the criminal justice system and on society as a whole.

The National Lawyers Guild, Detroit Chapter, is an organization comprised of lawyers, law students and legal workers

SSIA

whose purpose is to secure legal redress for individuals and organizations not being represented by the traditional bar associations. The committee on prisoner's rights is concerned with issues which have an impact on the condition of prisoners in Michigan.

The Michigan Council on Crime and Delinquency (MCCD) is a citizens' action organization which advocates for reform in the criminal and juvenile justice systems through research, training and public education programs. MCCD provides technical assistance to citizens' groups interested in establishing programs aimed at preventing crime and delinquency and treating offenders. MCCD advocates for the equitable and just treatment of adult and juvenile offenders.

It has been the experience of Amici that prisoners adjust better, and are able to take advantage of potential rehabilitative programs available in the prisons, when their families and home lives are stable. Amici have observed first hand the impact of termination of parental rights - the most serious interference with family stability - on prisoner/parents. They have also witnessed the particular problems these parents encounter during the termination process. Because of our collective commitment to serving prisoners, improving their conditions of incarceration, and in promoting their re-entry into free society, Amici are submitting this brief in support of Appellant's position.

I. A STATUTE PROVIDING FOR THE TERMINATION OF THE FUNDAMNETAL RIGHT OF RAISING AND CARING FOR ONE'S CHILD, WHICH BASES THE TERMINATION OF PARENTAL RIGHTS UPON THE PARENT'S STATUS AS A CONVICTED FELON OR UPON HER/HIS INCARCERATION, VIOLATES THE CONSTITUTIONAL GUARANTEE OF EQUAL PROTECTION.

A. As a class, incarcerated parents face major difficulties, not faced by non-incarcerated parents, in preventing the termination of their parental rights pursuant to MCLA 712A.19a(d).

The statute under attack by Appellant by its very terms creates a distinct class of parents, i.e., those who are convicted of felonies proving unfitness to have future custody or those imprisoned for a period so as to deprive the child of a normal home for more than two years.

The existence of this statute - which Amici submit is unnecessary in light of other statutory bases for terminating a parent's rights - is an added burden to prisoner/parents who already face serious problems in providing for their families upon incarceration.

A parent of minor children who has been primary caretaker of her/his minor children, invariably faces hardships in finding a suitable home for those children upon incarceration. Even when the parent can make arrangements for a relative or close friend to care for the children, and little or no state intervention occurs, the emotional and physical separation create a strain on both parent and child. The parent is isolated and cannot easily communicate with the child and his/her guardian.

State intervention by the Michigan Department of Social Services (hereinafter "DSS"), and the Juvenile Court bring added burdens to the prisoner/parent. Even if termination proceedings are not instituted, the prisoner/parent finds it difficult or impossible to communicate with the children, the guardian, or DSS or court personnel; to attend hearings; and to make suitable arrangements for her/his children.

When parental rights termination proceedings are commenced, the stakes become much higher. Although entitled to an attorney, see Reist v Bay County Circuit Judge, 396 Mich 326, 241 NW2d 55 (1976), JCR 1963,Section 6.3(a)(2)(b), the prisoner/parent faces unique difficulties in defending against termination which are not faced by non-incarcerated parents.

A prisoner/parent cannot readily communicate with her/his attorney, who usually practices in the county where the children reside and the proceedings are held. In-person attorney-client interviews prior to the actual hearing are rare. The prisoner can only make collect phone calls to the attorney and letters are a poor substitute for direct communication.

The prisoner also faces the disadvantage of not being able to appear at all hearings scheduled in the matter. A writ must be signed by the judge which orders the prisoner to be released and transported to court. Attorneys may fail to request such a writ, and judges may be unwilling to issue it for all but the final termination hearings. Therefore, the prisoner may not be able to attend all preliminary review

hearings and must rely solely on an attorney with whom she/he has had little direct contact.

Communication and visits between prisoner/parents and their children also pose serious problems. If the DSS worker does not make arrangements to bring the children for visits, the parent must rely on the guardian to bring the child for a visit. If the relationship between the parent and the guardian is not a good one, the guardian might refuse to bring the children for visits. Even a well-intentioned guardian may find it difficult to arrange a visit.* Telephone contact between parent and child is similarly hampered: because a prisoner may only place collect calls, such calls can be stymied if the guardian does not choose or cannot afford to accept the calls.

The fact of incarceration also may prevent the prisoner/parent from establishing a positive relationship with the DSS caseworker. This may impact on the willingness of the worker to make the effort to arrange a visit at the prison.** A good rapport between parent and social worker may affect whether or not termination proceedings will be brought.

The problem is intensified for women prisoners. Various studies have focused on the families of female prisoners, but

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* For example, the bus schedules and visiting hours at two prisons, Huron Valley Women's Facility and State Prison of Southern Michigan, are as follows:
Huron Valley Women's Facility -- no bus service, visiting from 10 a.m. to 5 p.m. daily.
State Prison of Southern Michigan -- three buses daily serving Detroit and Grand Rapids, visiting hours from 10 a.m. to 10 p.m. daily.

** It may be easier for a non-incarcerated parent, whose children have been removed from the home due to some maltreatment to see her/his children, than it is for the incarcerated parent, whose separation is not due to any improper treatment of the child.

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are applicable to all parents who are the primary caretaker of their children at the time of incarceration. Statistics show that the average woman who is incarcerated for a felony has more children than the average male felon - 2.43 to 1.3, and that 56% of these women are mothers of dependant children. Note Mothers Behind Bars: A Look At the Parental Rights of Incarcerated Women, 4 New England Jrl Prison Law 141, 142-43 (1977). Other studies indicate that fully 80% of the women in prison have dependant children. Singer, Women and the Correctional Process, 11 Am Crim L Rev 295, 302 (1973); Note, The Prisoner-Mother and Her Child, 1 Cap L Rev 127, 128 (1972).

Recent national surveys, reported in a study done of women prisoners in Michigan, indicate that 55 to 60% of the women were unmarried, and most expected to support themselves upon release, indicating that a significant number of children are primarily dependant upon their mothers. Figueira-McDonough et al., Females in Prison in Michigan, 1968-1978 (University of Michigan School of Social Work 1981), p. 16.

The Figueira-McDonough study, at p. 34, concluded that in the ten year period studied, one fourth to one half of all women incarcerated in Michigan prisons had dependants. During the last years of the study, 1976-1978, however, a full one half of incarcerated women had dependants.

The reason that child care arrangements and family stability is such an acute problem for incarcerated women is, of course, because the primary responsibility for child care and nurturance is generally placed on mothers in this society. This factor was

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recognized in the Figueira-McDonough study, at p. 45:

> Female inmates often differ from their male counterparts in their family responsibilities prior to incarceration. Because of role definitions, females are more likely to have custody and responsibility for their children. ... Other research reports on the status of both children and their mothers who are prisoners indicate that the situation is fraught with problems and suffering.

The psychological impact on incarcerated mothers is described in a study of California inmates:

> The role of the mother is more crucial for the mother herself than is the father's role to him, and . . . her separation from her children and the concomitant major change in her role more directly strike at her essential personal identity and her self-image as a woman. Note, Female Offenders: A Challenge to the Courts and the Legislators, 51 ND L Rev 827, 841-42 (1975), citing M. Bickley, Breaking Into Prison 97 (1974).

The personal feelings of one woman were reported in K. Burkhart, Women in Prison 48 (1973):

> All I could think about was my kids. It was like they was slipping out of my hands - falling away and I couldn't hold on to them or keep them safe. It was like everything I knew in the world was suddenly gone.

Office records maintained by the Amicus, Prison Legal Services of Michigan, Inc., reflect the impact which child care and custody matters have, particularly upon female prisoners. Requests for assistance in the "Parental Rights"* area at the Huron Valley Women's Facility (where approximately 450 women are incarcerated) are as follows:

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* Records maintained by Prison Legal Services of Michigan divide the types of assistance offered into forty-three categories of civil and criminal law. The area of "Parental Rights" includes a variety of assistance: preparing power of attorney forms pursuant to MCLA 700.405 whereby the prisoner/parent appoints a "guardian" for a period of 6 months; advising clients whose children are temporary wards of the state; assisting in communication with caretakers; and advising - although not actually representing - clients whose parental rights are being terminated.

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Dates	Total Requests For Assistance In All Categories	Total Parental Rights Requests	Percentage Of Total Requests
Feb. 1979 to May 1981	1213	150	12%

By comparison, the Prison Legal Services office at the State Prison of Southern Michigan, which houses approximately 5500 men, receives about five such requests for assistance annually.

Of course, not all of those requesting assistance for parental rights matters sere facing termination. A review of Prison Legal Services office statistics for the Huron Valley facility indicates that approximately 30 requests for assistance involved a woman facing termination of her parental rights. This number is 20% of all "Parental Rights" requests for assistance. Significantly, however, 60% of the requests involved situations where there was state intervention by the DSS and/or Probate Court.

Several counselors at Huron Valley were contacted in order to obtain an estimate of the number of women facing termination.* Each residential unit at the prison has a counselor (called a Residnet Unit Manager) who is generally familiar with the problems of individual residents. Most counselors were aware of 2 or 3 women presently undergoing a termination proceeding and knew of approximately 5 women who previously had their rights terminated.

The incarcerated parent who wants to make a strong challenge to termination proceedings is hampered in this effort by the

* Amici stress that this information is based upon estimates by counsleors. These figures are presented in an effort to demonstrate the scope of the problem faced by prisoner/parents and particularly prisoner/mothers.

fact of incarceration. Factors such as distance, isolation, inability to communicate and move freely combine to increase the difficulties of maintaining contact with, and arranging suitable placement for the child. Non-incarcerated parents facing termination proceedings pursuant to the other provisions of MCLA 712A.19a, do not face these hardships. And, most importantly, non-incarcerated parents are not confronted with the reality that, simply becuase of their status as prisoners, the state may seek to terminate their parental rights at any time.

STATE OF MICHIGAN
IN THE
SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

IN THE MATTER OF TAURUS F.,

A Minor

DEBORAH FINNEY,

Respondent-Appellant

Supreme Court

No. 65140

MICHIGAN DEPARTMENT OF
SOCIAL SERVICES,

Petitioner-Appellee

Court of Appeals No. 49862
Circuit Court No. 78-15722A
Probate Court No. 1293

APPELLANT'S SUPPLEMENTAL BRIEF ON APPEAL

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Attorneys for
Respondent-Appellant

Assisted by
JULIE H. HURWITZ
Law Student
University of Michigan
Law School

III. THE TERMINATION OF APPELLANT'S PARENTAL RIGHTS CANNOT BE UPHELD ON THIS RECORD.

In her appeal brief, Appellant alleges several serious procedural defects in the trial court proceedings, including the deprivation of her right to counsel, a lack of adequate jurisdictional findings at any time during the proceeding, and a failure to make factual findings at trial. Brief pp 1-4; pp 17-18. Appellees argue that these procedural violations are de minimis and that the court, by liberal construction of the petitions and by "assuming" factual and legal findings may cure these procedural problems and uphold the termination of Appellant's parental rights. Appellant believes that this Court may not and should not undertake this task.

A review of Appellee's recitation of the procedural history of the case discloses numerous blatant violations of the Juvenile Court Rules.* These violations include the following:

A. The Court had a duty to hold a preliminary hearing in the matter within 48 hours of the granting of the ex parte order. JCR 4.2(a). The preliminary hearing was not held until 11 days after the ex parte order was issued. Appendix 14a.

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* The rules were amended effective July 22, 1978. Appellant's citations will be to the rules in effect up to July, 1978 for hearings held before that time.

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B. The referee was required, upon receipt of Appellant's written request for adjournment, (Appendix 281-82a) to adjourn the hearing. JCR 4.2(b)(6). The referee instead took testimony when Ms. Finney was without counsel. Appendix 21a ff.*

C. Appellant was, at this hearing, deprived of her right to counsel, in violation of JCR 4.2(b)(6); JCR 6.1; JCR 6.3(a)(2)(b). Reist v Bay County Circuit Judge 396 Mich 326, (1976). Coleman v Alabama, 399 US 1 at 9-10 (1970); Pointer v Texas, 380 US 400 (1965).

D. The referee entered a probable cause finding against Appellant based on the April 3 hearing, before the date of the continued hearing and before Appellant appeared with counsel (Appendix 87a), in violation of JCR 4.2(b)(6) and (7).

E. The petitioner was not required to show probable cause at the continued probable cause hearing. (Appendix 23-25b). This violates

* It was during this hearing that the Department "as a question of trial technique" Brief, p. 7, Footnote, chose not to disclose to the court, through the petition or through testimony, their knowledge that Michelle Thomas had contacted the Department and said that she was willing to assume custody of Taurus. Appendix 10a, 70a. Appellant has little respect for this "technique" and believes that it is inconsistent with the Department's role in the Juvenile Process and the Prosecutor's role in the judicial system. See Brady v Maryland, 373 US 83 (1963); People v Amison, 70 Mich App 70 (1976).

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JCR 4.2(b)(6). The probable cause order authorized the Petition without consideration of Appellant's challenge to the jurisdictional facts alleged in the petition (appendix 27b) in violation of JCR 4.2(b)(6).

F. The probable cause hearing was not held until April 10, 1981, 18 days after the filing of the request for a petition (appendix 27b) in violation of JCR 4.2(b)(6).

G. In the April 10 order, the trial in the matter was scheduled for June 21, 1978 (appendix 28b) over 90 days after the request for the petition.

H. The amended petition was never authorized; there was no preliminary hearing on the amended petition. This practice violates JCR 4.2(b)(6) and (7).

I. At trial, the court failed to separate the proceeding into an adjudicative and a dispositional phase as required by JCR 8.1(a) and (b).

J. At trial the court failed to make independent jurisdictional findings as required by JCR 8.1(a). See proposed JCR 14.1. Appendix 91a .*

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* The Petitioner's argument that the court "impliedly" made any findings against Michelle Thomas is undermined by the plain language of the court's opinion in that: (1) the Court's opinion seems to adopt the findings of Referee Barrie from the April 3, 1978 probable cause hearing; (2) the court states that "a prison for adults is not an appropriate place for the care and nurture of an infant." Appendix 91a. Michelle Thomas has not been imprisoned.

91A

K. The trial court opinion does not contain specific findings of facts and conclusions of law so as to permit meaningful review. It does not disclose with specificity the statutory basis for the termination. See GCR 517.1; proposed JCR 14.1.

L. On Remand, the probate court specifically refused to consider jurisdiction (appendix 114a, 122a), and again failed to bifurcate the hearing into the phases required by JCR 8.1. The court further ordered Appellant not to discuss the Constitution during the proceedings. Appendix 122a.

M. On appeal to this court, Appellees now urge affirmance of the termination on a new factual theory -- which was not alleged in the petition or argued at trial. See Argument III, infra. This violates JCR 4.1. See also In re Gault, 387 US at 34. Appellees also urge this Court to base the termination on a new statutory ground. See proposed JCR 14.1.

In the face of these procedural violations, Appellees urge this Court to make heroic efforts to uphold this termination. Appellees would have this Court: (1) consider hundreds of pages of remand transcript intended to factually buttress the original termination; (2) ignore numerous procedural defects in the Court's assumption of jurisdiction; (3) assume and infer virtually every

9 9 A

contested factual finding in the case, and treat the assumed findings with utmost deference; (4) discover a new factual and legal basis to uphold the termination.

Even after Appellee's suggested cosmetic rehabilitation of the case record is accomplished, nagging questions exist. (1) What was the factual or legal basis for the Court's retention of jurisdiction between April 10, 1978 and the date of trial? (2) When and how did Appellant receive notice of the charge that her parental rights were being terminated because of a "legal availability" dispute between Michelle Thomas and herself? (3) How could the court make these "assumed" factual findings when the evidence allegedly supporting the findings was not introduced until a remand proceeding held two years after trial?

Appellant believes that this Court cannot and should not rewrite the lower court record in this case in order to uphold this termination. To do so would violate Appellant's rights to due process of law and run counter to sound judicial policy.

The procedures required of our juvenile courts, as defined in the Juvenile Court Rules, are not merely exhortatory, purely technical, and freely waivable to suit the needs of Petitioners. Many specific procedural requirements are constitutionally grounded. Reist, supra; LaFlure, supra; In re Gault, supra; see, generally, Michigan Juvenile Court Procedure Source Book (state Court Administrator's Office, Lansing, 1980 ed., Comments.) The overall procedures mandated by the state constitute the state's working definition of the due process appropriate to the nature of the case.

ICCA

See Smith v Offer, 431 US 816 at 849-50 (1977). Kent v United States, 383 US 541 (1966). As the Supreme Court wrote in Kent, on the subject of analogous procedural defects in a juvenile waiver proceeding:

> there is no place in our system of law for reaching a result of such tremendous consequences without ceremony -- without hearing, without effective assistance of counsel, without a statement of reasons. It is inconceivable that a court of justice dealing with adults, with respect to a similar issue, would proceed in this manner.

The procedures utilized by the Juvenile Court in terminating Appellant's parental rights and the mechanisms suggested by Appellees to cure these procedural defects on appeal violate Appellant's right to due process of the law.

Even if this Court could constitutionally overlook these procedural defects to affirm this decision, it should not. The department of Social Services, as a state agency involved in numerous termination proceedings, has the ability and the duty to assure that these proceedings comply with this Court's procedural rules. However, the final responsibility for assuring compliance with the procedural requirements of the Juvenile Court Rules rests with the Court itself. Placing this burden on appointed counsel to parents and children permits num erous violations to go unchecked in many cases. See Virtue v Wayne County Probate Court, 407 Mich 1150 (1979). Appellant believes that the rights of children and parents, and the policy of sound judicial administration, are best promoted by requiring strict compliance with this Court's procedural rules

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and by positing ultimate responsibility for assuring that compliance with the juvenile court itself.

It is a relatively rare occurrence that a direct appeal from a termination of parental rights reaches our Supreme Court. This Court should use this opportunity to remind our juvenile courts that they are courts of law and to standardize procedures in those courts. This Court should not give tacit approval to procedural laxity by rehabilitating AND affirming the juvenile court decision in this matter.

1C2A

HEARING HELD ON APRIL 3, 1978 BEFORE REFEREE ROBERT M. BARRIE

BARRIE: This is a hearing concerning a, a child known as Taurus Finney born um, March 17, 1978. I am Robert Barrie, Court Referee.

* * *

I have been handed a letter dated April 2, 1978 addressed to Judge O'Brien of this court, I understand this was hand delivered by a Mrs. Finney this morning, is that correct Ms. Finney?

FINNEY: No verbal response

BARRIE: The letter states that, Dear Judge O'Brien, normally I would address this letter to my attorney however the court has not yet notified me of an attorney being appointed to represent me regarding the pending matter. I am hereby requesting that my scheduled court date of April 3, 1978 be adjourned until my appointed attorney has had adequate time to confer with me and to prepare my case. Respectly, Ms. Deborah Finney, and the signature is here. A, the a, I will note for the record that the summons was delivered to Mrs. Finney on March 30 and concerning legal counsel, there is a statement on the reverse side of the summons directing that a if you desire a court appointed attorney, the court must determine prior to the hearing whether you are financially able and so on. Oh, if you are financially unable to employ an attorney and you desire the services of an attorney, you must notify the court immediately upon receipt of this summons. Um, I think that if we had received that notification a little earlier, Ms. Finney we would have an attorney for you my now. However, you are requesting that the court would appoint counsel, is correct, is it not

FINNEY: Yes.

BARRIE: And a, we will appoint counsel of course. Now let me explain your rights at this point, Ms. Finney. You have a right to counsel and we will act to on your request for counsel and appoint counsel prior to the next hearing.

* * *

BARRIE: I think um, for the purposes of um, establishing a probable cause to confirm that placement by the court order, I think I ask Ms. Fransen, she is familar with the circumstances of the case, would you come forward and be sworn please.

* * *

BARRIE: Go ahead counsel.

Q Thank you. What was the reason you initially contacted Deborah Finney?

A Um, she was referred to um, our agency because she was imprisoned at Huron Valley Women's Facility and she was pregnant and at that time there were no plans as to who could care for the child following it's birth.

Q Have you had contact with her since?

A Yes, I have had um, um, contact with her three or four times a month since the middle of January.

* * *

Q Does Deborah Finney have any other children that you are aware of?

A Yes, she has two other children. Um, Aleho, who is 9 years old and Alaika, who is a couple weeks short of 2 years old.

Q Do you know where they are presently residing?

A Yes, um, her son Aleho, is being cared for by Deborah's grandmother Sadie Martin in Baldwin, Michigan and her daughter, Alaika, is being cared for by her sister, Michelle Thomas, in Ferndale, Michigan.

Q Does, Deborah Finney's sister, Michelle Thomas have any other children of her own?

A Yes, she has two other children, who are between the ages 4 and 6.

Q Are they in the same household with Alaika?

ICSA

A They are.

Q Are you aware of the home situation there?

A I am presently not aware of the home situation, however, um, the Department has requested a home assessment to be conducted of Oakland County Department of Social Services to present us with a report of the home situation.

Q You said that a Alayo lives with his great grandmother, is that correct?

A That's correct.

Q Is a, she willing to take Taurus Finney?

A No she is not.

* * *

SIDO: Yes, we will contest this. Um, I don't understand exactly when this petition was written, but since the time it was written um, Ms. Finney's sister has expressed an interest in taking care of the child, It is my understanding that um, a home study is now being done, of her sister, to see if that is a feasible alternative. Um, and that is what my client wishes to have done providing that she is, that the sister be guardian while my client remains incarcerated.

* * *

Examination of M. Thomas; by Appellant

* * *

Q What was your first encounter with the caseworkers with regard to Taurus?

A Meaning what?

Q Let me rephrase that question. Did you call any of the Washtenaw County caseworkers and asked that Taurus be able to come and live with you?

A Yes. I called.I think right before she had the baby that I was wil... to take the child and if I could...

Q And who was...

A I don't know who I spoke to...and if I could go and pick her up. The told me no because she would be placed in a foster home.

Q Did they say that you might be able to get her later?

A They said they would you know..that she would go to a foster home first.

Q And there was no way you could have her?

A NO, not at the present. No.

Q And this was before Taurus was born?

A Yes.

Q Did you speak with the foster worker about adopting Taurus?

A Well, they said that I couldn't get her, you know, the way it was standing now. And that it would be best for me to...to try and adop her. And I tried to explain to them that me and my sister have talke and we had agreed that I would take Taurus Michelle the same way I ha Alaka. That I would have legal guardianship and the parents could come and get her and keep her for the weekend, what have you and brin her back.

* * *

CROSS EXAMINATION OF MS. MICHELLE THOMAS BY MR. JAMES RIDELLA

Q How soon are you prepared to take custody of Taurus Finney?

A Well, as soon as I can get a crib. And the crib is down the street because my girlfriend has two cribs and she told me she is willing to let me have one.

Q So in fact you could almost take...virtually take custody immediately if that were the decision.

A Yes. Just give me time to move the bed out from the upstairs and take it down stairs.

* * *

Q Okay. You are ready to take them as soon as you can get a crib and until such time the court says Mr. Cowens should have her.

A Right.

* * *

CROSS EXAMINATION OF MS. VALERIE FOWLYER BY MR. JAMES RIDELLA.

Q You said,I believe, that under normal circumstances Ms. Finney would be released from prison on March 23, 1985.

A I said that was her first out date.

Q Alright. And you said that was under normal circumstances.

A I don't know what to tell you. There are not normal circumstances where I work. Okay.

Q Okay. Would...

A Now, this is...this is the first out date that everyone works toward and for. She will have, you know, objective to INAUDIBLE toward get this out date. However, the parole board is the agency which would give her this date and they take in some many different factors in making their decision—the nature of the crime, her background, her attitude while in the institution—so many different factors that I can say under normal situtions.

* * *

Q Okay. First let me ask you this. You...you did indicate a date in 1985. Now is that date based on consecutive sentences rather than concurrent sentences.

A Yes, it is.

Q Now is it possible that that might be a mistake?

A That's right.

Q Alright. And that has not been resolved yet.

A Well, when my client brought it to my attention. I called her judge and he said that she would have to...if there was going to be any change in her talking about it, it would have to go through an attorney

Q Okay.

A So, it is possible that it could be change.

Q Alright. And that the question of whether her sentencing is to be concurrent or consecutive has not yet been resolved.

A Not altogether. No.

Q Okay. Now you said that there were two ways for that first release date to be change. One was by the sentencing judge changing the sentence and you said the other was by special parole. Will you tell me what special parole is?

A Special parole is where any employee of the institution feels that a resident has excelled in her rehabilitation process where she has done everything in the institution that is feasible for her to reach the goal of rehabilitation or that she has succeeded in some certain event that so effected her rehabilitation that speeded it up. She would put in a report indicating that she felt this way about the resident. It would be taken to our INAUDIBLE committee and they would vote on whether or not a report is to be written and submitted to the parole board for consideration.

* * *

Q How much earlier than one would normally get out can one get out by virtue of special parole?

A Since the...since an employee can submit the request for consideration this could happen at anytime in her rehabilitation process.

Q In theory, someone could submit a report pertaining to Ms. Finney tomorrow.

A That's right.

The court could not interfere with the situation if my client was not in prison. If my client were free she could take the child and leave it with the sister and the court could not, unless abuse or neglect was shown, interfere in this living arrangement. That is all we are asking the court do here, is allow this family to do what they want to do with their child. In a situation where an adequate home could be provided by a relative, I feel that is what we should...what should be done, and what this court should do.

Office Supreme Court, U.S.
FILED
OCT 11 1983
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82-6768

DEBORAH RENE FINNEY,

Appellant,

v

MICHIGAN DEPARTMENT OF SOCIAL SERVICES,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE
STATE OF MICHIGAN

MOTION OF APPELLEE MICHIGAN DEPARTMENT OF SOCIAL SERVICES TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

I. DOES THE INSTANT APPEAL PRESENT A FEDERAL QUESTION?

II. ASSUMING ARGUENDO THAT A FEDERAL QUESTION IS PRESENTED, ARE THE QUESTIONS PRESENTED SUBSTANTIAL?

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82-6768

DEBORAH RENE FINNEY,

Appellant,

v

MICHIGAN DEPARTMENT OF SOCIAL SERVICES,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

THE NATURE OF THE CASE AND THE STATE STATUTE INVOLVED

Taurus Finney was born on March 17, 1978 to Appellant Deborah Finney, who had been convicted of several felonies on separate dates: (1) carrying a concealed weapon, (2) attempted possession of heroin, and (3) delivery of heroin. 415 Mich 512 at 553.

Appellant was imprisoned in the Huron Valley Correctional Facility. Id. While in prison, Appellant accumulated 23 major misconduct convictions involving insolence, disobedience, threatening behavior, theft and assault.

At the time of trial, Appellant's first "out date" was March 23, 1985.

Appellant had been incarcerated since October of 1976, but subsequently escaped and remained at large for three months. 415 Mich 512 at 553. During that time Appellant had intercourse with one Martin Cowen, also a prisoner convicted of possession of heroin, who was in minimum security. Id. Taurus was born of this union. During this time, Appellant was married

to James Finney, whose whereabouts are unknown. Id.

Appellant has also given birth to two other children. Alayho was born June 22, 1968 and is cared for by his maternal great grandmother. Id. Aleka was born April 14, 1976 addicted to heroin or methadone, as was Appellant. Aleka has been cared for by Appellant's sister, Michelle Thomas, since birth. Id. Ms. Thomas has legal guardianship over that child. Id.

The Department of Social Services tried to help Appellant plan for Taurus. Id. When Appellant was 7-1/2 months pregrant, social workers met weekly with the expectant mother and visited with relatives, including Michelle Thomas, a sister, in an attempt to find someone willing to care for the baby. Id. Initially, this sister said she was unable to care for the child. Id. Later, she said she would be willing to take the baby if arragements were permanent. Id. Appellant incorrectly states in her brief that near the time Taurus was born, Michelle Thomas contacted the Department of Social Services to make arragements to pick up the child but the Department of Social Services informed her she could not have the baby. Appellant's Jurisdictional Statement, p 9. Michelle Thomas called the Department of Social Services three days after Taurus was born and informed them that she had decided to take the baby, but only on a permanent basis as she was "unwilling to give it to Martin or Deborah". 1b.
Appellant however would not agree to adoption. 415 Mich 512 at 553. Ms. Thomas never intended to pick Taurus up, as she indicated that "she was willing to wait until the legality had been resolved." 1b. Ms. Thomas has never filed a petition in the probate division seeking legal guradianship and nothing has been suggested or done by the mother to effectuate such a plan. 415 Mich 512 at 554.

Pursuant to an Amended Petition filed by the Department of Social Services,a termination trial was held on July 31, 1978. 75A-76A, 415 Mich 512 at 554.
At trial, Dr. Judith Kleinman, child psychiatrist, (3b-5b) testified that the most desirable plan would be a permanent placement as soon as possible. 9b

She testified that if a parent is not available to parent an infant, permanent adoption is preferable because "the optimal development in an infant through childhood is served by having consistent parents who are present over time so that the child can develop a sense of reliability and permanence." 7b-8b.

The Probate Court entered its Opinion and Order terminationg Appellant's parental rights on August 24, 1978. 41A-44A. The Court found that the material allegations of the petition had been substantiated; (42A) that Taurus was within the jurisdiction of the court under MCLA 712A.2(b)(1-2); MSA 27.3178 (598.2)b(1-2), and that it would be in the child's best interests to be placed under the permanent custody of the Court.

Mrs. Finney appealed to the Washtenaw County Circuit Court, which affirmed the determination of the probate court in the decision signed October 26, 1979. 415 Mich 512 at 554. Taurus remained in the care of the foster family with whome she was placed at age 10 days. On April 23, 1980 the Michigan Court of Appeals denied Deborah Finney's application for leave to appeal. Id. A delayed application was filed in the Michigan Supreme court and on October 3, 1980, the matter was remanded for an evidentiary hearing concerning the status of the Appellant, her sister, her husband, Taurus, the putative father and the placement alternatives available. Id. The Probate Judge was permitted to make a recommendation as to custody and placement. Id.

Following the evidentiary hearing held in January 1981, the Probate Judge stated that "it is the court's unqualified recommendation that Taurus should remain in the foster home and that adoption should be pursued." Id. Nevertheless, the Supreme Court granted leave and heard oral arguments. On July 7, 1982, the Supreme Court again remanded the case to the Probate Court for clarification and findings of fact concerning possible placement with the aunt. Id.

On remand, the Probate Court explicated its basis for assuming jurisdiction over Taurus, and found that Ms. Thomas' home was not suitable for either adoptive or long term temporary placement. 63-65A.

On December 23, 1982, the Michigan Supreme Court affirmed the lower court's decision by an equally divided Court. 415 Mich 512. While the members of the Court agreed that Appellant herself could not provide proper custody for Taurus, they disputed whether or not Taurus was "otherwise without proper custody" under MCLA 712A.2(b)(1); MSA 27.3178 (598.2)(b)(1), so as to bring the child within the jurisdiction of the probate Court. 415 Mich at 512.

The Justices for affirmance held that the State makes a prima facie case that a child is otherwise without proper custody under MCLA 712A.2(b)(1); MSA 27.3187 (598.2)(b)(1), where it is shown that the parents or persons in actual custodycannot provide proper custody and no other arrangements to provide proper custody have been made. 415 Mich at 512. Further, once it is shown that the parent cannot provide proper custody, the burden of introducing evidence shifts to the parents as to whether other arrangements for providing proper custody have been made. Id at 556. The court reasoned that placing this burden on the parent who asserts such an agreement avoids placing the Department of Social Services in the impossible position of having to show that such agreements do not exist, given that any number of such possible alternative arrangements might be asserted. Id. The Justices for affirmance, found no evidence to support the conclusion that Appellant and her sister had reached an agreement whereby her sister would take custody of Taurus. Id.

The Justices for reversal held that there was no showing that Taurus was without proper custody. Id. They would hold that affirmative proof of Appellant's refusal to consent (to her sister's conditions for taking custody of Taurus), is necessary. Id. Further, it was held that since the probate court did not have jurisdiction ab initio, it was not appropriate to consider whether the §19a(d) was constitutional. Id at 518.

The Michigan Supreme court did not make reference to any federal authority in its opinion.

Taurus remains in the custody of the foster family with whom she was initally placed as a 10 day old infant. 71A,52A-55A. Taurus' foster family reflects her biological background and she has prospered in their care. 12b-14b.

Her foster parents have expressed an interest in adopting her. 415 Mich 512 at 554. Taurus is now 5-1/2 years old and apparently starting elementary school this fall.[1]

---

1. Appellee would object to Appellant's statement that she has been released from prison and maintains a home for her two older children as it has no basis in the record or Appellant's appendix.

MOTION TO DISMISS

I. THE UNITED STATES SUPREME COURT SHOULD DISMISS THE INSTANT APPEAL FOR WANT OF A FEDERAL QUESTION.

Earlier this year, the United States Supreme Court held that respect for the independence of State Courts, as well as avoidance of rendering advisory opinions, have been the cornerstone of the Supreme Court's refusal to decide cases where there is an adequate and independent state ground. Michigan v Long, 103 S Ct 3469 (1983). In Santosky v Kramer, 102 S Ct 1388 (1982), Justice Rehnquist wrote for the dissent, that "if ever there were an area in which federal courts should heed the admonition of Justice Holmes that "a page of history is worth a volume of logic," it is in the area of domestic relations. This area has been left to the States from time immemorial, and not without good reason. Justice Rehnquist also wrote that "this is not to say that the Court should blink at clear constitutional violations in State Statutes, but rather that in this area, of all areas, "substantial weight must be given the good faith judgments of the individuals (administering a program)... that the procedures they have adopted assure fair consideration of the ... claims of individuals." Mathews v Eldridge, 424 US 319, 349, 96 (1976).

Appellant, in her jurisdictional statement, argues in effect that the Michigan Supreme Court blinked at clear constitutional violations by resting its decision on independent and adequate state grounds. In support for this proposition, Appellant cites Lawrence v State Tax Commission, 286 US 276, 282-83 (1932), and refers to some of her briefs below in an attempt to somehow make them part of the record. 77A-103A.

Appellant miscontrues the holding in Lawrence. See Appellant's

brief p 13. Properly stated, Lawrence held that when a constitutional claim is denied on nonfederal grounds, the Supreme Court will inquire whether the State Court's decision rests on a fair or substantial basis. Id at 282. The burden of proving that the state ground of the decision is inadequate is on the party invokving the jurisdiction of the Court. Jankovick v Indiana Toll Road Commission, 85 S Ct 493 (1965). Appellant has made no showing or assertion that the state grounds relied upon in the State Court are inadequate. Rather, she asks this Court to render an advisory opinion concerning a question of state law. Appellant-Petitioner has failed to meet her burden.

Further, in Lynch v New York, 293 US 52 (1934), it was held that a claim of jurisdiction cannot be sustained by reference to briefs and statements which are not part of the record. Mr. Chief Justice Hughes wrote "it is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State... but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgement as rendered could not have been given without deciding it." In the instant case, assuming arguendo that a federal question was properly presented, it is clear that a decision on the federal question was not necessary to the determination of the State Court.

Should the United States Supreme Court decide to accept jurisdiction and test the validity of the relevant State statutory provisions against Appellant's asserted constitutional claims, the result would be an advisory opinion.

MOTION TO AFFIRM

I. THE FEDERAL QUESTIONS RAISED ARE NOT SUBSTANTIAL.

A. APPELLANT'S PARENTAL RIGHTS WERE NOT TERMINATED UNDER MCLA 712A.19a(d); MSA 27.3178 (598.19a) (d).

Section 19a. reads in part:

> Sec. 19a. Where a child remains in foster care in the temporary custody of the court following the initial hearing provided by section 19. ..."

In the instant case, Taurus was initally placed in foster care pursuaNt to an emergency Ex Parte Placement Order, under which she remained when a petition for the termination of parental rights was filed. 71A-72A. Thus, since there had been no inital hearing placing Taurus in temporary custody within Sec. 19a., that section could not be used as a statutory basis for a termination hearing. Indeed, in In the Matter of Sharpe, 68 Mich App 619 (1976), the Michigan Court of Appeals held that the Probate Court's power to terminate parental rights is not limited to cases where a child has been placed in foster care in the "temporary" custody of the court. In the instant case, while Taurus was in emergency custody, termination was sought and based upon MCLA 712A.2b; MSA 27.3178 (598.2b). 72A, 75-76A. Appellant is seeking United States Supreme Court review of a statute (Sec. 19a(d)) which was not used to terminate Appellant's parental rights and which the Michigan Supreme Court did not review.

B. ASSUMING ARGUENDO THAT SEC. 19(a)(d) WAS USED TO TERMINATE APPELLANT'S PARENTAL RIGHTS, APPELLANT DID NOT PRESERVE HER CONSTITUTIONAL ARGUMENTS IN THE TRIAL COURT.

Appellant's constitutional attack on section 19a(d) was not preserved for appeal by either motion or objection in the lower court. "The principle is firmly established that even a constitutional question which has not been raised below will not be passed upon on appeal." Falk v Civil Service Commission, 57 Mich App 134 (1974). Since the Michigan Supreme Court affirmed the lower court's holding without deciding any

of the constitutional issues raised by Appellant, it may be inferred that those issues had not been properly preserved for appeal. It has been held that where local procedures are reasonable and nondiscriminatory towards the raising of federal claims, the United States Supreme Court will respect local procedural requirements. See Davis v Wechsler, 263 US 22 at 24-25 (1923).

The Supreme Court would be circumventing an established State procedural rule should it decide to hear this case on the merits.

C. SUBSECTION 19a(d) IS BOTH CONSTITUTIONAL ON IT'S FACE AND AS APPLIED.

Appellant argues the felony ground of subsection 19a(d) is impermissably vague because the state fails to give her fair notice of what conduct is proscribed. Presumably, Appellant could obtain the notice she desires through examination of the Michigan Penal Code. All behavior deemed felonious by the Legislature is described therein and Appellant can "guide her conduct" accordingly.

Appellant also argues the wording "of a nature as to prove the unfitness of the parent" is unconstitutionally vague and therefore violative of due process. (Appellant's brief, p 16). In essence, she questions what type of crime proves a parent's unfitness for the future custody of her child. Such a question reveals the flaw in her analysis. The felony grounds of 19a(d) consists of two elements: (1) the parent must be convicted of a felony and (2) the nature of the felony proves the parent's unfitness for future custody of her child. See Duquette, Michigan Law Manual for Foster Care and Adoption, 166 (1981).

Thus, it is not automatic; it requires a case-by-case examination of the surrounding facts and circumstances. There must be a nexus between the criminal behavior and the child to sustain the felony ground of subsection 19a(d). The appropriate question therefore, is not what crimes Appellant was convicted of, but whether the nature of the crimes prove her unfitness

for future custody. There is no disagreement that unfit parents should not have custody of their children. The dispute between Appellant and Appellee is whether the nature of the crimes of which she was convicted prove Appellant's unfitness. See, In the Matter of Anthony L'CC', 48 AD2d 415; 370 NYS2d 219, 222 (1975). A statute is not defective because there is a dispute about whether a given set of facts meet the statutory standard. United States v Wurzbach, 280 US 396; 50 S Ct 167; 74L Ed 508 (1930).

In the area of domestic relations, and particularly child abuse and neglect, the legislature has seen fit to draft laws which give the trained professional dealing with these matters on a daily basis, the opportunity to exercise discretion and yet stay within constitutional limits. State judiciaries have consistently found such legislation to be constitutional under a similar challenge as Appellant makes in the instant case. In the Interest of VAEYHD, ___Colo ___; 605 P2d 916 (1980) ("whose enviornment is injurious to his welfare"); People v Schoos, 15 Ill App 3d 964; 305 NE2d 560 (1973); In the Interest of Lewis, ___Iowa___; 257 NW2d 505 (1977); Interest of Morrison, 259 Iowa 301; 144 NW2d 9;7 (1966); In the Mater of Trapp, 593 SW2d 193 (Mo, 1980); In the Interest of DLH, 19;8 Neb 444; 253 NW2d 283 (1977); New Mexico ex rel Health & Social Services Department v Natural Father, 93 NM 222; 598 P2d 11182 (1979) ("other care or control," "mental incapacity"); In the Matter of Carl & Annette, N 91 Misc 2d 738; 398 NYS2d 613 (1977) ("failure to plan for the future of the child"); In the Matter of Keyes, 574 P2d 1026 (Okla, 1978)("care and protection necessary for the child's physical or mental health"); In re William L, 477 Pa Sluper Ct 322; 383 A2d 1228 91978) ("has caused the child to be without essential parental care, control, or subsistence necessary for his physical or mental well-being"); In re David, _____RE_____; 427 A2d 785 (1981) ("proper care and maintenance," "permanently neglected child"); In the Matter of the Neglect & Dependency of DT, 89 SD 590; 237 NW 2d 166

(1975) ("lacks proper parental care," "whose environment is injurious to his welfare," subjected him to mistreatment or abuse"); Sanchez v Texas, 525 SW2d 933 (Tex App 1975) ("conduct which endangers the physical or emotional well-being of the child"); In re Proceedings Concerning a Neglected Child, 130 Vt 525; 296 A2d 250 (1972).

Appellant further argues that "deprived of a normal home" is impermissably vague citing Davis v Smith, 583 SW2d 37 (Ark) (1979). The Davis court was mainly troubled by the multiple choice of definitions from which it was to choose one. 266 Ark at 121; 583 SW2d at 42. The imrisonment ground of subsection 19a(d) provides more guidance than the Arkansas statute. It is the parent's imprisonment that deprives the child of a normal home, thus "normal" should be construed in the context of parental absence or incapacity. See, Coleman, Standards for Termination of Parental Rights, 26 Wayne L Rev 315, 342 (1980); Cf McGowan & Blumenthal, Children of Woman Prisoners: A Forgotten Minority, in the Female Offender 121, (L Crites Ed, Lexington Books Ed 1978), p 124 (describes various barriers to an inmate's plans to reunite with her children). In this context it is difficult to the point of impossibility to describe "normal" with more precision. Whether a child will be deprived of a normal home for more than two years depends upon many variables. These include, inter alia, the child's age and developmental stage at the time of separation, length of separation, the nature and extent of the relationship with the parent, and the possibility of meaningful visitation after separation. See, generally, Goldstein, Freud & Solnit, Beyond the Best Interests of the Child (Free Press Ed 1973), p 99; Testimony of Judith Kleinmant, MD. Due process does not require more specificity than is reasonably possible under the circumstances. In the Interest of Lewis ___Iowa___; 257 NW2d 505, 510 (1977). What is a normal home in any given circumstance requires a factual analysis with consideration of the above variables. Based upon the foregoing reasons, subsection 19a(d) is not impermissably vague.

It is not necessary to delve into Appellant's argument concerning the uncertainty of actual time served because Appellant has already been incarcerated for longer than two years. "[W]hen a person's conduct thus falls squarely within the proscription of the statute...that person may not invoke the vagueness doctrine because the statute may not be definite in its application to others." In the Matter of Carl & Annett N, 91 Misc 2d 738; 398 NYS2d 613, 618 (1977). Accord, In re David, _____RI_____; 427 A2d 785, 800 (1981).

D. APPELLANT'S CONSTITUTIONAL ATTACK OF 712.A.2(b); MSA 27.3178 (598.2)(b), ASSUMES THE EXISTENCE OF FACTS CONTRARY TO THE LEGAL FINDING OF FACTS BY MICHIGAN SUPREME COURT.

Appellant's attack on the constitutionality of MCLA 2(b); MSA 27.3178 (589.2)(b) includes erroneous statements of fact. First, Appellant assumes there was an alternative placement for Taurus with her aunt. The Justices for affirmance specifically found that there was no evidence that Appellant and her sister had reached an agreement concerning custody of Taurus, and further that the conditions of Michelle Thomas for a permanent arrangement had not been met. 415 Mich 512 at 555-556. The Justices for reversal made the same finding when in Section VII of their opinion they conclude "If the mother and aunt can agree on the aunt taking custody of Taurus ... then there would appear to be no reason why the question of Taurus' custody could not be speedily resolved...". Id at 549. While arrangements were discussed between Appellant and her sister, there was never an agreement upon which the parties involved were compelled to act. Ms. Thomas never petitioned for legal guardianship of Taurus. Further the Department of Social Services made a home study of Ms. Thomas and found her home to be unsuitable for either adoptive or long term temporary placement. 64A.

Thus, for the reasons enumerated above, Appellant's "proposed placement" alternative was in reality unavailable. This was the legal conclusion of fact by the Michigan Supreme Court. This conclusion renders Appellant's argument moot.

Appellant's argument also represents a serious misunderstanding of Justice Coleman's opinion: it mistakes the burden of production for the burden of proof. Once the state proves the parent is unable to provide proper custody, "... the burden shifts to [the] parent to introduce evidence that other arrangements to provide proper custody have been made." The state must then prove, by clear and convincing evidence, that either the arrangements have not been made or that the plan is improper under MCLA 712A.2(b); MSA 27.3178(598.2)(b)

This is a reasonable distribution given the nature of the inquiry. A parent who has made an alternative child care plan is uniquely able to bring that plan to the attention of the Court. The parent need only offer evidence that such an agreement has been reached. This is within the ability of even the most limited parent.

A requirement that the state bear both the burden of production and the burden of proof is much more intrusive. The state would be forced to send its agents into the community to interview everyone with whom the parent might have made a child care plan and then subpoena those people to testify that no such plan exists. Surely this is an undersireable result.

Under Appellant's analysis, she need only "propose" an alternate arrangement for custody and the State would have its hands tied, unable to inquire into the child's welfare any further. If what Appellant argues became law, Taurus would have spent a very long time lying in the hospital in which she was born while Appellant and her sister argued over the conditions which each required before a transfer of custody could be accomplished.

Certainly the State of Michigan has an interest in neglected children sufficient to prevent such a scenario. See, Lassiter v Department of Social Services of Durham County, North Carolina, 452 US 18 (1981)

E. THE PROCEDURES THROUGH WHICH THE STATE ASSUMED CUSTODY OVER TAURUS DO NO VIOLATE DUE PROCESS.

(i) Appellant did not preserve her procedural claims.

Appellant's procedural claims were raised for the first time in her Supplemental Brief on Appeal filed October 2, 1981. 95A-103A. Neither the trial court, the circuit court, nor the court of appeals had an opportunity to address these issues. The Michigan Supreme Court did not address these issues. The principle is firmly established that even a constitutional question which has not been raised below will not be passed upon on appeal. Falk, supra.

The United States Supreme Court will look to state law in determining whether an issue has been raised in a timely manner. Herndon v Georgia, 55 S Ct 794 (1935). The principle enunciated in Falk is not designed to shield valid claims from judicial review but rather prevent errors of law which appellants may later characterize as miscarriages of justice. Had Appellant properly pled her constitutional and procedural claims before the trial court she might have prevailed and avoided 5-1/2 years of foster care for her daughter. However appellant now makes these claimes 5-1/2 years later asking this court to break a psychological bond between Taurus and her family which will cause Taurus permanent psycholigical trauma. 52A-55A. With this result in mind along with the holding in Herndon, this honorable court should not now grant an exception to such a long settled principle of law by reviewing Appellant's constitutional and procedural claims.

(ii) The DSS ex parte assumption of custody over Taurus did not violate due process. Under MCLA 712A.11 and JCR 2, the probate court can assume emergency custody of a neglected or abused child and set a subsequent hearing with notice to all relevant parties. JCR 2 reads in part:

> .1 If it shall be made to appear to the court upon filing of a duly sworn... petition..., together with such proofs as the court may require,

> that there are reasonable grounds to believe:
> (A) Conditions or surroundings under which the child is found are such as to endanger his health, morals, or welfare,...
> The court may immediately issue an order to the persons having custody or control of the child to appear at the time and place certain for a preliminary hearing as provided 4.2., and may endorse thereon an order that... person authorized by the court immediately take the child into custody... or effect temporary placement of such child pending such preliminary hearing.

A brief look at the ex parte order shows that emergency custody was taken by the DSS "pending hearing on April 3, 1977 at 11:00 a.m.", for which Appellant was given notice and did appear. 71A.

The state did not violate any of its own rules and Appellant was given notice and did appear for a full hearing of the matter. 104A-107A.

(iii) Appellant was not deprived of a right to counsel

The Probate Court judge read Appellant's letter into the record and indicated that he was granting her request. 104A-105A. The judge adjourned the hearing until April 10, 1978. 16b.
The judge, however, did take testimony merely to determine whether there was probable cause to continue the emergency placement order pending the continuation of the hearing adjourned until April 10 at Appellant's request. 104A-106A. Had the judge not done this, the emergency placement order would have been dissolved instanter, before a hearing on the matter had been held.

At the continuation of the hearing on April 10, 1978 Appellant appeared with her counsel, Kathryn Sedo. The judge informed Sedo:

> BARRIE: ...Ms. Sedo, you are aware, probably I think that we took some testimony last time for the purpose of establishing probable cause for a temporary placement.
>
> SEDO: I understand.
>
> BARRIE: And that is available to you if you haven't heard the tape and (sic) you want to hear it, you may do so.
>
> SEDO: Thank you.

Appellant never made any objections to the testimony taken on April 3,[1] 1978 and did not raise any constitutional claims concerning representation until her supplemental brief on appeal to the Michigan Supreme Court 5 years later.

Given that counsel for Appellant was present and able to object to every single word of testimony ever taken in this case, Appellant's constitutional right to counsel in this parental termination proceeding as defined by the "fundamental fairness" standard has not been violated.
See Lassiter, supra.

(iv) The DSS disclosed all material facts in their petition and Appellant received a fair trial.

At the preliminary hearing held April 10, 1978 the court became aware that Michelle Thomas had expressed an interest in taking custody of Taurus. 2b. The Court was informed by DSS that a home study was being done and that DSS was awaiting the results. 2b. Further, the amended petition filed July 20, 1978 contained Appellant's allegation that her sister was willing to care for the baby. 75A-76A.
At the termination trial held on July 31, 1978 all this information was before the court and Michelle Thomas offered extensive testimony concerning her position in this matter. 415 Mich 512 at 538-539.

At the time the ex parte emergency placement order was authorized, the DSS had received a phone call from Ms. Thomas stating her conditions for assuming custody and her intention to wait until the "legality had been resolved". 1b. She was not "available to care for the child", as Appellant states in her brief at page 33. This was the legal finding

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1. Appellant's statement that "At the subsequent hearing, Ms. Finney appeared with counsel, and denied the accuracy of the facts stated in the petition" is patently innaccurate and with out basis in the record. Appellant's brief at page 32.

of fact by the Michigan Supreme Court. 415 Mich 512 at 555-556. Appellant's claim that DSS withheld information from the Court is without merit when considered in light of the facts as they existed rather than as Appellant would prefer them to be.

F. THE CHILD'S INTEREST IN A PERMANENT HOME REQUIRES THAT APPELLANT'S APPEAL BE DISMISSED AND THE STATE COURT DECISION AFFIRMED.

The Court's decision on whether to take jurisdicion over the instant appeal must reach a balance between justice and finality. The interest in finality is at its strongest when a child's custody is at stake. Lehman v Lycoming County Children's Services, 102 S Ct 3231, 3238 (1982) The only obstacle between Taurus and foster parent adoption is Appellant's instant appeal. A decision to hear this case on the merits would be devasting. As stated in Lehman, "[t]here is little that can be a detrimental to a child's sound development as uncertainty over whether he is to remain in his current 'home' under the care of his parents or foster parents, especially when such uncertainty is prolonged." 102 S Ct at 3239

The trial court issued the order terminating Appellant's parental rights on August 24, 1978. Taurus was 4 months old. Appellant's Delayed Application for Leave to Appeal was filed with the Michigan supreme Court on May 9, 1980. Taurus was a little over two years old. The case was submitted October 13, 1981 and decided on December 23, 1982. Taurus is now 5-1/2 years old and apparently in school.

> [L]ong delays ... by... judicial process, have disasterous effect on the child's well-being. It can be argued that much of the trauma to little Paula Marie Mathers Furlong* was the result of the seven years which transpired before arriving at a final result. We cannot ask the children to carry such a burden.

Lincoln, Judicial Considerations in Child Care Cases, 11 Wayne L Rev 709, 714 (1965).

Injustice would result should this honorable court decide to hear

* In re Mathers, 37 Mich 516 (1963)

this case on the merits. It is unnecessary to speculate how long such a process might take. Even another day is too long for Taurus. As stated by Justice Coleman, Taurus "...is in danger of being severly hurt by the excessive duration of litigation leading to a permanent home." For this reason Appellee respectfully but vigorously urges this Court to dismiss Appellant's jurisdictional statement and affirm the decision reached by the Michigan Supreme Court. In re Mathers, 371 Mich 516 (1963)

CONCLUSION

For the reasons stated herein, this appeal should be either dismissed or affirmed.

Respectfully submitted,

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Michigan Department of Social Services

DATED: October 6, 1983

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home from work at 4:30

-3-20 PC to Michele Thomas 542-7697
resides in Oakland Co.
→ Could she adopt Mika in this county
She has decided to take the baby (the weekend - it was named after her)
She wants to keep it permanently because she would be unwilling to give it to Kathy or to Deborah & She is willing to wait until the legality has been resolved
Michele has been off ADC for 1 year —
She works for Ford's - Rouge assembly
She receives $145 every two weeks for Mika's babysitting costs

3-20 PC to Mary Taylor
She will be able to care for the child.
Told her that I would call Mon.
re: that it appeared that the child would go into foster care on Monday

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BARRIE: Mr. Theifels can we hear from you on this? Are you aware of the situation, and can you confirm that a home study is being done.

THIEFELS: Again I would like to defer to Mary Fransen, if you don't mind your honor?

FRANSEN: Yes, we are aware of that situation and we have requested Oakland County Department of Social Services to conduct a home study, and a they are in the process of doing that, and we are awaiting a report from them.

SEDO: I spoke before the hearing with Mr. Sacks, and Mr. Duquette, and um, at that time we talked about possibly adjourning this proceedi for three weeks so we can get the report on the home study. We al talked about the possibilities of setting a trial date some time in June assuming that we would need that.

BARRIE: Is there any objection, I'll start with the Guardian, is there any objection?

RIDELLA: I have no objection.

SACKS: I have no objection.

BARRIE: Can you give me a trial date in June, please. Ms. Sedo, you are aware, probably I think that we took some testimony last time for the purpose of establishing probable cause for a temporary placement.

SEDO: I understand.

BARRIE: And that is available to you if you haven't heard the tape and you want to hear it, you may do so.

SEDO: Thank you.

BARRIE: The testimony is sort of outlined in the last order. I prop then to authorize the filing of the petition and adjourn the matt until June.

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* * *

DIRECT EXAMINATION OF DR. JUDITH KLEINMAN BY MS. SUSAN CARLSON. SWORN IN.

Q What is your name and profession?

A I am Judith Kleinman. I am a psychiatrist.

Q Are you licensed to practice psychiatry in this state?

A Yes, I am.

Q When were you licensed?

A Three years ago. That would make it 1975.

Q Okay. What is your occupational background?

A I got a Doctor of Medicine Degree from the University of Rochester in 1969; I did an internship in pediatrics in Pittsburgh and then a general psychiatry residency at the University of Colorado; and had been finishing up a fellowship in child psychiatry here in Ann Arbor since 1975.

Q Okay. Are you board certified or board eligible?

A Board eligible.

Q What does that mean?

A That means that I have the training to be certified as a general psychiatrist when I get around taking the board.

Q What hospitals are you associated with?

A The University of Michigan, Children's Psychiatric Hospital in particular.

Q And what positions do you hold there?

A At the hospital, I am a fellow and child psychiatry. I also am consultant to the child abuse and neglect team at the University of Michigan and outside of the hospital I have a private practice.

Q Do you have a speciality in...with...in the general speciality of child psychiatry?

A Not really. I am...They are interested in child development and in family dynamics.

Q Could you estimate the number of children that you see as patients or for evaluations in a month?

A Wow. Well, I see probably 15 to 20 hours of patients in a week. So in a month that would make it roughly 60 to 80.

Q What is the general age range of your patients?

A Well, it depends. The patients I am seeing in therapy are largely five and six on up to adolescents. In evaluations I frequently am asked to see younger infants in the family context.

Q Does your experience include the problems associated with attachment to a parent who INAUDIBLE authority in home environment?

A Well, in the sense that I am frequently asked to evaluate and consult on cases in which the question is being raised in an infant whether the home is adequate through my child abuse and neglect work. Yes.

MS. CARLSON: Your Honor, Dr. Kleinman qualifies as an ex- t witness and I move that her testimony be admitted as expert testimony.

JUDGE: Counsel.

MS. SEDO: I have no objection, Your Honor.

MR. WINTER: No objections, your Honor.

MR. RIDELLA: I have no objection.

JUDGE: You may proceed.

DIRECT EXAMINATION OF DR. JUDITH KLEINMAN BY MS. SUSAN CARLSON CONTINUED.

Q Could you please describe the attachment process of an infant's first year of life?

A Yes. Attachment process is to...is sort of a INAUDIBLE word that refers to usually the one person in an infant's life who is psychologically the most important. And it's roots start really from the day of birth. But it becomes a prominent developmental process starting around five to six months of age. Peaking at eight to ten months of age. And then continuing on in it's resolution really several years after that. What it involves is an infant gradually becoming aware of one other person who is specific, who is loving and caring, who is present over time, who is reliable; and to begin to rely on this person emotionally for meeting the infant's needs. Psychologically, that is important because it provides the basis not only for the infant's beginning sense of himself as a worthwhile person, but also as a beginning root of relationships with other people, both in terms of seeing other people as real and separate from himself—this evolves over several years--and in handling the feelings about other people the mixture of love and anger that we all have about other important people in our lives. And to begin to trust and rely on other people.

Q You mentioned that the process continued for a number of years.

custody.

A The difference is really in the time...well, two things. One there is the difference between visiting and having care of a child for several hours every day. The other difference is the time framework is very different for an infant. between seeing an infant day and seeing an infant every week or every few weeks.

Q Okay. You said that a critical time for adoption is five months of age.

A I said a critical time for attachment begins at five months. Therefore optimum time for adoption is prior to that time.

Q So the child is five months...If the child we are speaking of is five months old and has already reached the optimum age for adoption?

A Well, yeah. It has reached the age where it becomes more difficult then traumatic from now on to switch.

Q Okay. Any kind of change;at this point if the child is five months old any kind of change is going to be of equal difficulty.

A Any change would be difficult now. Over time whether it is equal or not depends on how many other changes are down the road and what the quality of home is that the child is going to.

Q Okay. Let me put that question little differently. Let us assume at the age of one..the child is five months old now and at the age of one adoptive parents are found. Let us also assume at the age of one either or both of the parents are now available to take physical custody of the child. Is the change going to be any more or less traumatic going to adoptive parents as opposed to the real parents.

A Well the trauma of the change at that age would be the same. The differences would be if there were differences between the homes looking at it from the child's point of view.

with a relative who has already taken care of a sibling or it is go to stay in foster care and be placed for adoption. Which of those two is more preferable?

A I think that would depend on...

Q Or neither?

A ...well, I think that would depend on the weighing of the alternatives. One, how likely it is the child would be adopted and the other is what the relatives is like, what this relative is like as a caring, mothering, parenting person.

Q Can you answer that in the abstract?

A No.

Q Alright. Then you cannot give any opinion as to which of those situations more desirable?

A Which ever one would lead to the most INAUDIBLE consistent caring would be the most desirable, and beyond that I really can't answer not evaluating the people.

Q Which you take the position that if attachment with parent can not be ...cannot occur parental rights should be terminated and the child not be allowed to have any contact with those parents.

A I think that depends on the age. Generally it is my opinion...

Q Say a five month old child.

A ...in an infant that the optimal thing is if the parent cannot provide adequate parenting that adoption is preferable, and that visitation provides confusion rather than is constructive.

Q So you would take...so you would take the absolute position that if visitation is available the parenting is not available that parental rights should be terminated?

A You are pushing me to hard and fast answers that I am not sure I can

make in this position. But I think in general...

Q Would you...well, would you take that absolute position.

A It is my general opinion that if parenting is not available that it is best to put the child...if an infant in a home where the parents will be seen as parents and the child will not have contact with the other parents.

Q We obviously have the fact situation in this trial now in which parents cannot be parents at the present time. However, contact with the parents is available. We have on the other hand the possibility of adoption and a choice has to be made between the two. As a psychiatris how would you make this choice between the two?

A My choice looking at the optimal development of the child would be that a permanent adoption would be preferable unless it was so unlikely that you were in fact talking about a series of foster homes.

Q Why would permanent adoption preferable?

A Because the optimal development in an infant through childhood is served by having consistent parents who are present over time so the child can develop a sense of reliability and permanence.

Q I am not sure what you mean by consistent parents. If I and...If I were married both and I and my wife worked and we were out of the house and we had a full time babysitter would we be providing consistent caring for that...for that child?

A You might well be if you were there and had good quality time in the evenings. You would be consistent over time as people who were there and cared for the child if the babysitters came and went.

Q How much would that differ from...from the child visiting their mother once a week and visiting their father whatever intervals was appropriate Until such time either one of them could take actual physical

things a minute ago and I agreed that if the child goes anywhere but the foster home now that there will be an effect probably since he is reaching the vulnerable period of attachment. And we agreed that six months from now if the child had been in the foster home this whole time that a change would have definite impact. Whether a change right now how traumatic that would be is...you are getting to the vulnerable point but the longer it waits the more traumatic it will be.

CROSS EXAMINATION OF DR. JUDITH KLEINMAN BY MR. DAVID WINTER CONTINUED

Q But it can be...the situation can...may be not be the remedy completely but there can be some sort of therapy given at working with the parents and...

A The best therapy and healing comes from going to a consistent, loving, caring, committed home.

MR. WINTER: No further questions.

JUDGE: Further cross examination.

MS. SEDO: I have no further...

JUDGE: Mr. Ridella, you have had your cross examination.

MR. RIDELLA: Yes.

JUDGE: Redirect

MS. CARLSON: No.

JUDGE: Alright.

QUESTIONING OF DR. JUTIH KLEINMAN BY JUDGE O'BRIEN.

Q Take the INAUDIBLE of your testimony is the most desirable thing is to place the child in permanent hands as soon as possible.

A Yes.

Q Whether it is adoptive or with parents.

A Yes.

JUDGE: Alright. That's all. Thank you.

A Again you are coming back to the question about prognosis. I know of no therapy that will take away the impact. One...and one can't do therapy with a one year old very well anyway. You can work with the parents and you can try to minimize the effect to maximize the healing that occurs, but the impact usually in my experience remains on the child's sense of himself and on relationships with important people.

Q But if the parents are willing to establish this sense of self-relationship between the two can't that overcome the traumatic experience...

A Well, again you are getting a bit into hazy zones where predicability is not hard and fast but in general it has been my experience that... like in so much else of human development there is an optimum time for this to occur and you can't just make it up later. You can make some constructive impact but it is in an infant that the six to twelve months old period seems to be the time that this optimally occurs and if it doesn't occur than you can't go back and just make it up.

Q I...I understand that but we have already established that no matter what happens in this situation right now this child has missed this period. But...

MS. CARLSON: Objection. We have not established that.

MR. WINTER: I thought she said that there would be either way whether the child was adopted or...

JUDGE: Your statement again was what?

MR. WINTER: That in the event either way whether the child is adopted or the child goes to its natural parents that this period of..what do you call "optimum."

DR. KLEINMAN: Attachment.

MR. WINTER: Attachment that will occur or that won't occur.

DR. KLEINMAN: Well, we have discussed several different

A Right.

Q ...have either they attach to one or two or they don't attach to anybody at all. Is that what you are saying?

A If there has been people who have done most of the care over this vulnerable period of time. Yes.

Q Okay. So then this have to happened in your studies and your field as...as a doctor of pediatrics, you must have seen this happened a number of times.

A Actually not very often in that most of the hospitals that I have been in children don't remain that long and as I have said the nursing situation is such that in fact it changes so frequently that there isn't usual one primary person.

Q In your studies, have you ever read of a situation that has occurred lets say by hospitalization?

A I don't think of any hospitalization per say but there are very analogous type of situations.

Q What I am trying to get at...what I am trying to get at is that there must be some sort of therapy that hospitals go through or that certain organizations have for that child upon release in that situation where they have thrown dependent on a nurse or a doctor?

A Actually, currently the way that problem is usually handled is that all attempts are made for the mother to be in the hospital as much as possible, to be the care taker so that there will be carry over when the child comes home.

Q Let's assume that the mother is not available; she is sick also.

A Yeah, then there would be a definite impact.

Q Then is there...is there therapy that can be...

A Yes. I can try anyway.

Q Well, I know that earlier in my opening statement I described Taurus but at this time let me ask you to.

A Okay. Taurus is a two and a half almost three year old, black child. Uh, she's a delightful little girl. She's small for her age. Uh, she smiles most of the time, has a very bright smile, big eyes. Uh, she's got a strong will, she will tend to ...to uh put up a fuss if something happens that does suit her quite right. She is sensitive if she gets her feelings hurt easily and will cry if they do. Uh, because she's such a small child and she's also very bright and alert that when she walks around and speaks, people tend to gravitate toward her because she's so cute, and they don't expect these big words coming out of this little tiny girl.

Q Are you familiar with her development?

A I've been able to follow it over the course of the time that I've been on the case and through my visits to the home.

Q Can you describe it to the court?

A Well, the development has been very normal in every respect. That is her...her physical development has met all of the typical developmental milestone. She sat up at the proper time. Around six or seven months was crawling. Uh, began to battle and say words around nine months, pulled up at appropriate times, was walking at thirteen months. Uh and now at two and half is toilette train and speaks well in sentences. So uh developmentally she has come along very well. She seems to be a happy child andthat she uh relates well to her foster family. She has had no major behavior problems that would indicate that she is not a healthy...you know not a happy child. She's been healthy with just minor kinds of medical problems.

Evaluation of Taurus Finney; by Kathleen C. Faller

Taura:

The family call Taurus Michelle, Taura. She is a bright, assertive child who appears very happy and active. She is quite verbal for a 2 1/2 year old and is already potty trained. She eats well, takes a nap every afternoon and appears to have a considerable sense of self esteem.

She is small in height for her age and the cause of this has recently been assessed at the University Hospital (Drs. Martha Spencer and Nancy Hopwood, Pediatric Endocrinology). Tests show that her growth hormone is half that for a child her age and that the problem is organic. However, recent measurements show a growth spurt. Therefore, they will wait one year before considering any intervention.

Parent-child interaction:

It was obvious that Taura felt very comfortable with her foster parents and as though she belonged to the Taylor family. Thus, initially when we arrived Taura eyed us in a playful way and hung between Mrs. Taylor's knees watching us. Later she sat in her foster mother's lap and then sat beside her on the couch. She brought in a large football (beachball size) to play on and elicited Mrs. Taylor's help in this endeavor. Mrs. Taylor was able to attend to Taura's needs and talk with us at the same time. She responded to Taura's demands with patience and equanimity. Mrs. Taylor also was aware of Taura's needs for care and control, and could set limits in a non confronting way.

It was clear that Mrs. Taylor got alot of pleasure out of Taura and enjoys having her around. Mr. Taylor has a good relationship with Taura as well. He is particularly concerned about her future.

Family interaction:

This is a relaxed and flexible family where there are limits but the capability to respond to individual needs. The Taylors are very caring of children, yet not possessive. Taura's relationship with Chopper and Anthony was briefly observed and seems a good one. Mrs. Taylor reports they get along well.

Impressions:

There is no doubt that the Taylors are Taura's psychological parents. They have cared for her since she was 10 days old, and she has known no other family. She has prospered in this environment and feels the security which is essential to her psychological growth and development.

a divorce, was at work from 5:00 A.M. to 4:15 P.M. and had difficulty with babysitters, and lived in an apartment with only two bedrooms, one of which already contained three children and would have four with Taura. Termination of parental rights was granted. However, the case is presently on appeal.

Taura was placed in the Taylor foster home at 10 days of age and has been there ever since. She is now 2 1/2 years old. Mrs. Taylor reports that Taura had three of four one-hour visits with Deborah a couple of years back and that Deborah did write. She also sent Taura a dress and the Christmas before last, she sent two piggy banks, one for Taura and one for Mrs. Taylor. The Taylors want to adopt Taura.

Family composition:

The Taylor family consists of Johnny and Mary Taylor, Chopper (Leonard) 14, Mrs. Taylor's son by a previous marriage, Tikka Gregory, 5, a longterm foster child, whose parents want to release her for adoption, Anthony Harrison, 3, a biracial child who was not wanted by his mother, and Taura, 2 1/2.

The Taylors are in the process of adopting Anthony and wish to adopt Tikka and Taura when this becomes possible.

Chopper is a bright, well adjusted adolescent who relates well and is involved in caring for the younger children.

Foster home status:

The Taylors have been licensed foster parents since 1975. In 1976 they became one of the two subsidized shelter homes for Washtenaw County; one is black, the Taylors, and one is white. Therefore in addition to the three children they have in a longterm basis, they take children temporarily on an emergency basis. Mrs. Taylor reports they have not had any shortterm placements for a month or so but sometimes they are busy. All of the reports on them done by the Department of Social Services indicate that this is an exemplary foster home.

Financial situation:

The Taylors live in an integrated working class neighborhood in Ypsilanti. Mr. Taylor works for Ford and has been there for some time. He usually leaves for work at 6:00 A.M. and returns about 3:30 P.M. He tries not to work overtime so that he can spend time with the family and help Mrs. Taylor with the children.

Mrs. Taylor worked as a welder at Chrysler for 7 years but quit to drive a school bus in 1975. Since they became one of the county's shelter homes, she does not work outside the home, but stays at home to care for the children and takes in some children for day care.

Referee's Report and Recommendation

Probate—Criminal 4007

State of Michigan,

The Probate Court for the County of WASHTENAW

In the Matter of the TAURAS FINNEY

At a session of said Court, held on the 3rd day of April A. D. 1978

Present, Hon. FRANCIS L. O'BRIEN, Judge of Probate.

REFEREE'S REPORT AND RECOMMENDATIONS:

PRESENT: Deborah Finney, mother
James Ridella, guardian ad litem
Donald Duquette, Supervising Attorney
Michael Sack, Student Attorney
Paul Thiefels, State Department of Social Services
Mary Fransen, State Department of Social Services
Ava Adler, court worker
Officer Rider, Washtenaw County Sheriff's Department
Officer Hulse, Washtenaw County Sheriff's Department

Preliminary hearing was held by the Referee on Petition 78-136, wherein the State Department of Social Services requests that the Court terminate the rights of the parents of the minor child. Testimony was taken from Mary Fransen, worker for the State Department of Social Services. She stated she has been in contact with the mother since January 1978; that the child was born on March 17, 1978 at Huron Valley Correctional Facility. Witness stated on information and belief that the mother has been incarcerated in prison on drug and weapon charges and will not be eligible for release before 1985; that the mother is still married to one James Crawford Finney, whose whereabouts are unknown, and that the biological father is one Martin Cowen aka Thaddeaus Russell who is incarcerated at Camp Cusino, Shingleton, Michigan and won't be eligible for release at least until May 1979. Witness stated that there are two other children in the family which are being taken care of by relatives, but they are not willing to take the above-named minor into their care.

The child's mother appeared with a written request for appointed counsel, and made no further statement.

Referee's Recommendations Concerning Findings and Disposition:

It is recommended that the filing of the petition be authorized.

It is further recommended that the Court find that the conditions or surroundings under which the child was found are such as to endanger his health, morals or welfare in that a prison for adults is not an appropriate place for the care and nurture of an infant; and that accordingly, the emergency placement of the child in temporary licensed foster care should be authorized and continued without prejudice to the rights of either parent. It is further recommended that counsel be appointed for the mother, that further hearing on the petition be held on Monday, April 10, 1978 at 2:00 in the afternoon and that notice of these proceedings be communicated by summons in the manner provided by law to James Crawford Finney and to Martin Cowen aka Thaddeus Russell.

Robert M. Barrie

ROBERT M. BARRIE
Referee

156

File No.

Order

ORDER OF THE COURT

The above recommendations are approved.

IT IS NOW THEREFORE ORDERED that the above-named minor child be placed under emergency custody of the court, in licensed foster home care, under the supervision of the State Department of Social Services, until further order of the court;

IT IS FURTHER ORDERED that the above-named minor is not be be removed from this placement without permission of the Juvenile Division of the Probate Court, until further order of the court;

IT IS FURTHER ORDERED that counsel be appointed for the mother, Deborah Finney;

IT IS FURTHER ORDERED that summons be issued to James Crawford and to Martin Cowen aka Thaddeus Russell;

IT IS FURTHER ORDERED that the State Department of Social Services be authorized to pay the expenses incurred in such placement;

IT IS FURTHER ORDERED that hearing be adjourned to Monday April 10, 1978 at 2:00 in the afternoon.

FRANCIS L. O'BRIEN
Judge of Probate
Juvenile Division

cmb

cc: SDSS
mother
Child Adv.
gal
court worker
counsel for mother

FILED

APR 3 1978

JUVENILE REGISTER

pm

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Supreme Court, U.S.
FILED
OCT 27 1983
ALEXANDER L. STEVAS
CLERK

IN THE SUPREME COURT

OF THE UNITED STATES

OCT 28 PAGE 1

OCTOBER TERM, 1983

82-6768

DEBORAH RENE FINNEY,

Appellant,

v

MICHIGAN DEPARTMENT OF SOCIAL SERVICES,

Appellee.

* * * * * *

(In re Taurus F., a Minor.)

APPELLANT'S RESPONSE TO APPELLEE MICHIGAN DEPARTMENT OF SOCIAL SERVICES' MOTION TO DISMISS OR AFFIRM

ATTORNEY FOR APPELLANT

ROBERT FAIR GILLETT (P29119)
LEGAL SERVICES OF SOUTHEAST MICHIGAN
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APPELLANT'S RESPONSE TO APPELLEE MICHIGAN DEPARTMENT OF SOCIAL SERVICES' MOTION TO DISMISS OR AFFIRM

I. Introduction

In this combined appeal and petition for a writ of certiorari, Appellant, Deborah Rene Finney, seeks this Court's review of an order, affirmed by an equally divided Michigan Supreme Court, terminating her parental rights to her daughter, Taurus.

Appellant's Jurisdictional Statement was docketed on May 19, 1983. Through a letter from the Clerk of the Court, the Court ordered Appellee to respond to Appellant's Statement. The State's response was filed on October 11, 1983.

This response brief will address the state's arguments that there are no Federal questions raised in this appeal. Appellant will not respond to Appellee's conclusion that the issues raised by this appeal are not substantial.

Throughout the course of this case and its brief, Appellee asserts factual statements without reference to the record. These assertions are both inappropriate and misleading.

Appellant believes that the relevant facts for this appeal are those stipulated to by the parties (77-79a), approved by the Circuit Court (79a), and incorporated in Chief Justice Williams' opinion for reversal (415 Mich 519, 22, 7-9a).

In her Jurisdictional Statement, Appellant Finney updated the Personal Facts section of the stipulation by stating that she has been released from prison and is caring for her two older children. Defendant objects to this statement as being without support in the record. (Brief, page 6) The order of the Honorable Justin Ravitz, dated February 5, 1982, resentencing Miss Finney to 2 years probation is part of the Michigan Supreme Court record in this case. See, Michigan Supreme Court Appendix at 325a. The Justices for reversal explicitly recognized Miss Finney's release. 415 Mich 550, 33a. Appellant's statement concerning her release is both accurate and supported by the record.

II. This Case Raises Substantial Federal Questions.

Appellant requests Supreme Court review of four constitutional issues implicit in the Michigan Supreme Court's termination of her parental rights. None of these issues was directly addressed by the Michigan Supreme Court.

The Michigan Supreme Court decision was an affirmance by an equally divided court. The Justices for reversal did not reach the constitutional questions because they reviewed the case on state statutory grounds. The Justices for affirmance in an opinion devoid of citation simply ignored these constitutional claims.

Appellant's constitutional claims were properly raised in the state courts and are appropriately reviewed in this court.

A. The Constitutionality of MCL 712A.19a(d)[1]

The statute upon which the termination of Miss Finney's parental rights is based is unconstitutional because it discriminates on its face against inmate parents and because it is impermissibly vague. See Jurisdictional Statement at pages 15-19.

1. The Basis of the Termination

The state asserts that this termination is not based on MCL 712A.19a(d). (Brief page 8) This suggestion contradicts the legal conclusion of every Michigan court that has addressed this issue.

Appellee's own amended petition sought termination under the statute. (75-76a) The Probate Court termination order of July 1978 quotes the statute verbatim. (41-42a) The Circuit Court opinion considers and upholds the constitutionality of the statute on

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[1] Where a child remains in foster care in the temporary custody of the court following the initial hearing provided by section 19, the court may make a final determination and order placing the child in the permanent custody of the court, if it finds any of the following:

* * * *

(d) A parent or guardian of the child is convicted of a felony of a nature as to prove the unfitness of the parent or guardian to have future custody of the child or if the parent or guardian is imprisoned for such a period that the child will be deprived of a normal home for a period of more than 2 years.

appeal. (45-48a) The July 1982 remand order of the Michigan Supreme Court directs the Probate Court to make findings concerning "its disposition of this matter pursuant to MCL 712A.19a(d)." (56a) On remand, the Probate Court again specifically makes its termination findings under the statute. (60-61a) See also, 415 Mich 518. (7a)

No court involved in this case has ever suggested another basis for the termination of Appellant's parental rights besides MCL 712A.19a(d). Appellee's argument that MCL 712A.19a(d) is not relevant to the appeal in this case is an astonishing misstatement of a clear record.

2. Preservation of the Issue

The state also suggests that Appellant did not raise the issue of the constitutionality of MCL 712A.19a(d) in the state courts. In her claim of appeal to the Circuit Court and her first appeal brief, which were Appellant's first written pleadings in this case, Miss Finney challenged the constitutionality of MCL 712A.19a(d). (80-82a) The Circuit Court ruled on this claim and upheld the statute. (45-48a)

There are indications that the Michigan Supreme Court acknowledged that Appellant's claims concerning the statute were properly before it. Most significantly, the Justices for reversal stated they need not reach the constitutionality of MCL 712A.19a(d) because that would reverse on a state gound. 415 Mich 518, 7a. The court as a whole remanded the case to the Probate Court for findings under the statute. (56a) See also, In re Mudge, 116 Mich App 159, leave held in abeyance, 414 Mich 903 (1982), involving a challenge to MCL 712A.19a(d) and citing In re Finney.

Although Appellee argues below that Appellant's constitutional claims were not preserved, no Michigan court refused to hear these claims. Instead, both lower courts' handling of this case suggests that the state court was required to face the issue.

Appellant Finney adequately preserved her constitutional claims in the state courts, and the state courts' resolution of these

claims makes further inquiry by this Court unnecessary. See, Oscala Star-Banner Co., v. Damron, 401 US 295 (1970). If there is any question whether Appellant's constitutional claims were properly raised by the state courts, this Court should continue this case to provide Appellant an opportunity to obtain a certificate to that effect from the Michigan Supreme Court, not dismiss Appellant's appeal.[2] Lynumn v. Illinois, 368 US 908 (1961).

B. The Michigan Supreme Court's Interpretation of MCL 712A.19a(d)

Appellee does not argue that issues II and III of Appellant's Jurisdictional Statement[3]

are not properly before the court.

Since these issues are unanticipated interpretation of state law articulated for the first time by the state Supreme Court, Appellant has had no prior opportunity to raise these issues. See, Brinkerhoff-Faris Trust Co. v. Hill, 281 US 673 (1930).[4]

The state argues that these constitutional claims are foreclosed because they are based on a fact -- that Miss Finney's sister, Michelle Thomas, was available as a caretaker for Taurus -- that was decided against Appellant. The state argues that Appellant's arguments are "moot" because they are foreclosed by a

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[2]Contrary to Appellee's assertion, Davis v. Wechsler, 263 US 22 (1923), does not permit states through procedural rules to preclude appellate review of Federal law issues. The case states that "the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." 263 US at 24

[3]II. Whether MCL 712.A.2(b), MSA 27.3178(598.2)(b), as construed to provide that children whose parents voluntarily wish to place them in the custody of relatives are "without proper custody" and subject to the jurisdiction of the court, violates appellant's rights under the First, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution.

III. Whether a State, in a parental rights termination case, may, consistent with Santosky v. Kramer, _____ US _____, 102 S Ct 1388 (1982), shift the burden of producing evidence as to the adequacy of the family placement for the child from the State to the parent.

[4]As in Brinkerhoff-Faris, Appellant raised these issues to the state Supreme Court through a motion for rehearing. The court denied Appeallant's motion without opinion. (40a)

"legal conclusion of fact". See Brief p. 12.

Appellee's argument misstates the central conclusion of the opinion for reversal. The Justices for reversal found based on the record at trial that Miss Thomas was neither "unavailable" (because there was no explicit agreement between sisters) or "unsuitable" as a placement for Taurus. These Justices therefore concluded that the Probate Court lacked jurisdiction to place the child or consider the termination of parental rights. 415 Mich 549. (31a) See discussion at 27-28a. (6-7a)[5]

Neither Appellee's "mootness" theory nor its finding of "legal fact" is factually or legally supportable.

C. Due Process Violations in the Assumption of Jurisdiction

Appellant argues that the state's procedures in assuming custody of her child violate her due process rights. Appellee argues that these claims were not properly preserved.

Appellant briefed and argued this issue to the Michigan Supreme Court. (95-103a) The Justices for reversal decided the case on statutory grounds, thus avoiding the constitutional question. The Justices for affirmance simply ignored Appellant's constitutional claims. Neither opinion declines consideration of this issue because of a failure to timely raise the issue.

Appellee's response to Appellant's Jurisdictional Statement underscores the seriousness of the constitutional violations.

1. Ex Parte Assumption of Jurisdiction

Appellant claims that the state has a duty to provide parents facing the loss of their children with notice of the hearing where custody over a child will be assumed unless an emergency situation precludes notice. Appellee argues that notice to and an appearance (an appearance without counsel) by Miss Finney 11 days after her child was taken satisfies due process. (Brief page 14-15)

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[5]The language cited by Appellee in its brief to support this purported "legal fact" refers to the family's placement plans post judgment "if the mother now released from prison seeks custody for herself." 415 Mich 550.

2. Right to Counsel

The state argues that Miss Finney was not deprived of her right to counsel because "counsel for Appellant was present and able to object to every single word of testimony ever taken on this case." (Brief page 16)

This statement is simply untrue. Miss Finney appeared without counsel at the April 3, 1978 hearing. (73-74a) She requested counsel and an adjournment. (104-106a) Testimony was taken. (106a) The jurisdictional findings from the April 3, 1978 hearing were considered by the court in terminating Appellant's parental rights. (41a) Appellee argues that the post hearing appointment of counsel who has the right to "hear the tapes" (2b) of prior hearings satisfies Appellant's constitutionally based right to counsel. (Brief 15-16)

3. Failure to Disclose Favorable Evidence to the Court

Appellant argues that her due process rights were violated when the state failed to disclose to the court that Miss Thomas was interested in caring for Taurus and instead, on three separate occasions, represented to the court that no relatives were willing to care for the child. (69-70a; 72a; 105-106a)

The state argues that the court was fully informed as to Miss Thomas' interest in Taurus through later statements by Appellant's counsel and through Miss Thomas' trial testimony. (Brief page 16, 2b)[6]

Appellee seems to suggest that Aappellant's later opportunities to correct record the record cure the states's nondisclosure.

The constitutional violations apparent from the record are egregious. These violations permitted the Ex Parte assumption of jurisdiction over Miss Finney's child, and that assumption of

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[6]The state also attaches a page of "Telephone Notes" from an anonymous DSS worker. (1b) These notes appear to confirm that Miss Thomas contacted the department "to take the baby" prior to the date of the petition. Neither the fact of Miss Thomas' contacts or these handwritten notes were presented to the court for its determination of jurisdiction.

jurisdiction has irretrievably prejudiced Appellant and her family in these proceedings. At each subsequent hearing family separation has been the status quo.

Constitutional protections of family integrity must be enforced from the outset of the juvenile process to prevent "emergency" assumptions of jurisdiction from casting a long shadow over the private lives of families.

CONCLUSION

For the reasons set forth above, Appellant Deborah Rene Finney, respectfully requests this Court to deny Appellee Michigan Department of Social Service's motion to dismiss or affirm, to note probable jurisdiction, and to schedule this case for argument.

Respectfully Submitted,

Robert F Gillett

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CERTIFICATE OF SERVICE

Robert Gillett hereby certifies that on the 27th day of October 1983, he caused to be mailed by first class mail 2 copies of Appellant's Response to Appellee Michigan Department of Social Services' Motion to Dismiss or Affirm to:

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Robert F Gillett

Robert F. Gillett